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M. 21 95-  
VERMONT, SUPREME COURT  
= REPORTS 31

OF

CASES ARGUED AND DETERMINED P

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

BY JOHN W. ROWELL.

VOL. 45.  
NEW SERIES, VOL. I.

MONTPELIER :  
PUBLISHED BY J. & J. M. POLAND,  
1873.

Entered according to Act of Congress, in the year 1873, by  
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*Rec. Dec. 26, 1873*

**JUDGES**  
**OF THE**  
**S U P R E M E C O U R T**  
**DURING THE TIME OF THESE REPORTS.**

---

**HON. JOHN PIERPOINT, CHIEF JUDGE.**

<b>HON. JAMES BARRETT,</b>	}	<b>ASSISTANT JUDGES.</b>
<b>HON. ASAHEL PECK,</b>		
<b>HON. HOYT H. WHEELER,</b>		
<b>HON. HOMER E. ROYCE,</b>		
<b>HON. TIMOTHY P. REDFIELD,</b>		
<b>HON. JONATHAN ROSS,</b>		

## ERRATA.

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Page 128, line 5 from bottom, for "Barrett" read *Bennett*.

Page 369, line 17 from bottom, for "defendant" read *plaintiff*.

Page 514, line 9 from bottom, for "rested" read *vested*.

Page 515, line 21 from bottom, for "aqueate" read *adequate*.

Page 519, line 16 from bottom, for "Daniel" read *David*.

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF WASHINGTON,  
AT THE  
AUGUST TERM, 1872.

PRESENT :

HON. JAMES BARRETT, HON. HOMER E. ROYCE, HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS,	}	ASSISTANT JUDGES.
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IRA ANDREWS, ADMINISTRATOR OF MARTIN ANDREWS' ESTATE, *v.*  
THE TOWN OF MORETOWN.

*Practice.*

It is the duty of the court to submit to the jury every material issue raised by the evidence in the case.

If there is any evidence tending to show that the parties to a contract might have understood it in a particular way, it is not error for the court, but rather their duty, to submit it to the jury to find whether they did so understand it.

ASSUMPSIT for a town bounty. Plea, the general issue, and trial by jury, March term, 1872, PECK, J., presiding.

The intestate enlisted to the credit of the defendant, on the 31st of March, 1864, under a contract made by his father, the plaintiff, with Charles Liscomb, one of the defendant's selectmen, that he should have a bounty of two hundred dollars, and as much more

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Andrews, administrator, v. Moretown.

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as the town paid any one else. Liscomb said to the plaintiff at the time the contract was made, "You will get more than two hundred dollars bounty, because we have got to pay what other folks do, and we have got to have the men." There was nothing in the testimony which limited the contract to the payment of two hundred dollars, and as much more as the town paid to fill the then existing call upon the town for men. Under a warning of May 24, 1864, "to see if the town will instruct the selectmen to procure volunteers to fill the deficiency on the draft, and also to fill the quota on the present call," the town voted on the 6th of June, 1864, "to accept the ten men already furnished by the selectmen," and instructed the selectmen "to procure volunteers enough to fill the next requisition of the government, if they in their judgment shall think it best." At the time said contract was made, the defendant's need for men was upon its quota under the call of March 14, 1864, upon which quota the intestate applied. The town paid as high as seven hundred dollars for men under a future call; but there was no evidence that it paid over two hundred dollars under the call of March 14th. The plaintiff claimed to recover seven hundred dollars, less the two hundred dollar bounty paid to the intestate. The court charged the jury, among other things not excepted to, that it was for them to find how the parties understood the contract at the time it was made; that if they mutually understood that the intestate was to have two hundred dollars, and only so much more as the town paid any one else to go upon the then existing call upon the town for men, the plaintiff could not recover; to which the plaintiff excepted.

*Heaton & Reed and T. J. Deavitt, for the plaintiff.*

The contract was to pay the intestate as much as the town should pay anybody, without reference to any particular call. The court should have so instructed the jury as matter of law. There was nothing to be submitted to the jury.

*Randall & Durant, for the defendant.*

The case comes clearly within *Wrisley v. Waterbury*, 42 Vt. 228, and *Bucklin v. Sudbury*, 43 Vt. 700.

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Andrews, administrator, v. Moretown.

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The opinion of the court was delivered by

Ross, J. The plaintiff's evidence, which was the only evidence in the case upon the point on which the exception arises, was, "that the agreement was that the town would pay his son Martin (the intestate) a bounty of two hundred dollars, and if they paid anybody else any more, they would pay his son Martin just as much as they paid anybody; that Liscomb (the selectman with whom the trade was made) said at the same time to the witness, 'you will get more than two hundred dollars bounty because we have got to pay what other folks pay, and we have got to have the men.'" The town was raising men at that time to fill a quota of ten men, and had given its selectmen authority to raise the men necessary to fill the quota. There was nothing in the testimony stating the contract that, in terms, limited it to the payment of two hundred dollars, and as much more as the town should pay to fill the then existing call upon the town for men.

Was it error for the court, under this state of the testimony, to submit to the jury to find whether the parties to the contract mutually understood that the payment of more than two hundred dollars depended upon whether the town should pay more than that sum to fill the then existing call upon the town for men? The answer to this question depends upon whether there was any evidence tending to show that the parties to the contract might have so understood it. If there was any evidence having such a tendency, it was not only not error for the court to submit that issue to the jury, but it would have been error in the court not to have submitted it to the jury. It is clearly the duty of the court, by repeated decisions in this state, and elsewhere, to submit to the jury every material issue raised by the evidence in the case. We think the facts, that there was no other call then pending, that the selectmen were only authorized to raise men to fill the then existing call, which was probably known to the plaintiff, and the language used by Liscomb, "we have got to pay what other folks pay, and we have got to have *the men*," evidently referring to the ten men which the town was then called upon to raise, all tended to show that the parties might have understood that the obligation of the town to pay the intestate more than two hundred dollars depended upon

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Clark v. Wells.

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whether the town paid any other person more than that sum to fill the then existing call. It was altogether uncertain whether any further call for men would be made upon the town. It was quite improbable that the parties would have entered into a contract which they understood the selectmen had no authority to enter into.

Judgment affirmed.

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JOHN W. CLARK v. J. B. WELLS.

*Trover. Conditional Sale: Property by Accession.*

H. bought a stage-wagon of B. upon condition that it should remain B.'s till paid for. The plaintiff repaired it for H. by supplying new wheels and putting in new iron axles. H. wrongfully took it from the plaintiff's possession without paying for repairs. A few days thereafter, the plaintiff took H.'s note for the repairs, with an agreement that the "running part" of said wagon should remain his till said note was paid. H. never paid B. for the wagon, but the plaintiff knew nothing of B.'s claim. B., knowing the wagon had been repaired, but not knowing by whom, took it back from H. and sold it to the defendant, who knew nothing of the plaintiff's claim till long after his purchase. *Held*, that the plaintiff could maintain trover for said wheels and axles.

TROVER for the running part of a stage-wagon. Plea, the general issue, and trial by the court, September term, 1871, PECK, J., presiding.

Harrington purchased said wagon of Bridgman, upon condition that it should remain Bridgman's property till paid for. After Harrington had had it awhile, he took it to the plaintiff's shop for repairs, and the plaintiff repaired it by adding new wheels and new iron axles in place of the old ones, and attached the same thereto by means of the old clips and nuts. The old axle stocks were used on the new axles. Except as aforesaid, the wagon remained the same as when purchased by Harrington. After it was repaired, Harrington took it from the plaintiff's shop without the plaintiff's knowledge or consent. A few days thereafter, the plaintiff saw Harrington, and took his note for the amount of said repairs, with an agreement thereunder written that the "running part" of said wagon should be and remain the

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Clark v. Wells.

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property of the plaintiff until said note was paid. The plaintiff had no knowledge of Bridgman's claim, was unacquainted with Harrington,—who was in fact unworthy of credit,—knew nothing of his pecuniary ability, and would not have permitted him to take the wagon from his shop without paying for the repairs, had he known when he came for it; and the plaintiff never acquiesced in his taking it as he did, but always intended to enforce his lien thereon, or retain title to the wheels and axles furnished by him; and the court found that the plaintiff never parted with his title thereto.

After the wagon was repaired, Bridgman, never having been paid therefor, knowing it had been repaired, but not knowing by whom, and having no knowledge of the plaintiff's claim, took it back from Harrington, and sold it to the defendant, who had no knowledge of the plaintiff's claim till long after his purchase. The iron axles put in by the plaintiff could easily be detached from the axle stocks without injury to any part of the wagon. The court rendered judgment for the plaintiff for the value of the wheels and axles furnished by him as aforesaid; to which the defendant excepted.

*C. H. Heath*, for the defendant.

This is not a case of confusion of goods. 1 Hilliard on Torts, 550; *Haseltine v. Stockwell*, 30 Me. 237; *Bryant v. Ware*, Ib. 295. Nor a commixture of goods. But it is rather a case of repairs of the wagon, and of a substitution of some new parts for old parts which had been taken out and converted by the plaintiff without the knowledge or consent of the real owner. The question arises between the *bona fide* purchaser of the running part of the wagon and the plaintiff, who took away the old running part without the knowledge or consent of the true owner, and substituted the new, upon which he claims a lien by virtue of a pretended conditional sale by a third person. Mont. Liens, 86, and Appendix, 99. Harrington had no right to destroy the old wagon, or any part of it, nor could he give that right to another. Ib. 68; *Hiscox v. Greenwood*, 4 Esp. 174. Neither had he any ownership, as against Bridgman or the defendant, of any part of

the wagon, whether old or new, for Bridgman's lien run on the whole of it. It was the same wagon after the repairs that it was before. Its identity was not thereby destroyed.

*Heaton & Reed*, for the plaintiff.

Harrington wrongfully took the wagon from the plaintiff's possession, and no right accrued to him thereby, or to any one else, except upon paying for the repairs. *Silsbury v. M'Coon*, 3 Comst. 379, 390, and Hill's notes, 381-2-3. The doctrine of confusion and accession applies only in cases of fraud of the one making the confusion. *Ryder v. Hathaway*, 21 Pick. 298; *Pratt v. Bryant et al.* 20 Vt. 333. But here there has been no confusion, and no accession. The property can be easily distinguished and separated. Hence no change of property has taken place. Story Bailm. §40; 2 Kent Com. 364-5. This was a conditional sale, and not a lien of a workman for work on the thing bailed. No question can therefore arise as to the lien. Story Bailm. §440.

The opinion of the court was delivered by

REDFIELD, J. This action is trover for the alleged conversion of the wheels and axles of a wagon.

The case shows that a stage-wagon was sold by Bridgman to Harrington, with the condition that said wagon was to remain the property of said Bridgman until the price was paid; and that the purchase money was never paid. That, afterwards, at the instance of Harrington, plaintiff repaired said wagon by substituting new wheels and axles, for the old.

That Harrington took the wagon, thus repaired, from plaintiff's shop, without his knowledge or consent. Afterwards, Harrington gave his note to the plaintiff for such repairs, with the condition and agreement that the running part of said wagon should remain the property of the plaintiff until said note was paid. Bridgman thereafter took possession of the wagon, with the new gear added by plaintiff, and sold it to the defendant, without knowledge of plaintiff's claim.

The defendant is a *bona fide* purchaser without notice of any right or equity on the part of the plaintiff. The plaintiff's lien

for repairs upon the wagon was personal, and was waived by allowing the wagon to go back into Harrington's possession, and taking his note for the repairs, and security upon the parts of the wagon supplied by himself. He must, therefore, stand upon the *contract* between himself and Harrington.

We think the ordinary repairs upon a personal chattel, such as making new bolts, nuts, thills, and the like, become accretions to, and merge in, the principal thing, and become the property of the general owner. But in *this case*, the wheels and axles constitute the *running part* of the wagon. They could be followed, identified, severed without detriment to the wagon, and appropriated to other use without loss. The plaintiff was the owner, and never parted with the property. He had the right to resume possession when Harrington failed to pay the note. The property remained in him as perfectly as if, in the exigency of a broken wheel, or axle, he had loaned them for temporary use. Without questioning the main position of defendant's counsel, we think under the facts stated in this case, the property in those wheels and axle continued in the plaintiff, and that an action lies for the conversion.

Judgment affirmed.

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THE FREE PRESS ASSOCIATION v. GEORGE NICHOLS, SECRETARY  
OF STATE, AND WHITMAN G. FERRIN, STATE AUDITOR.

*Mandamus. Construction of Statutes. No. 61 of the Acts of 1867.*

The provisions of No. 61, of the acts of 1867, entitled "An act relating to State printing," which relate to advertising for sealed proposals for said printing, are mandatory. But the requirements of said act which relate to the time when said sealed proposals must be deposited in the office of the Secretary of State, were not intended as a limitation of power upon the part of the officers therein named in examining and acting upon proposals. The writ of mandamus is subject to the legal and equitable discretion of the court, and ought not to be issued in cases of doubtful right.

PETITION for mandamus. The petition alleged that on the first week in June, 1872, George Nichols, secretary of state, advertised in one weekly newspaper in each county where one was pub-

lished, for sealed proposals for printing certain state documents, and set out said advertisement in *hæc verba*, which, after stating that sealed proposals were thereby invited for printing certain state documents, naming them, and the form and style of the same, and when the same were to be completed, but not stating the time when said proposals must be deposited in the office of the secretary of state, read as follows: "Details of contracts will be governed in all particulars by the provisions of No. 61 of the acts of 1867, to which parties interested are respectfully referred. Blank proposals for bids will be furnished at once to parties desiring to enter into contract for any part of this work. The right to reject all or any proposals, as may be deemed for the interest of the state, is hereby reserved." The petition further alleged, that the relator, and others, applied to said secretary for blank proposals in accordance with said advertisement, which were furnished them, and the same were set out in *hæc verba*, and contained, among other things, the following: "Parties desiring to propose for the contract of any portion or all of the work herein designated, are requested to fill all necessary blanks and forward the same on or before the second Monday in July, to the secretary of state, Montpelier, Vermont, marked, 'Proposals for State Printing;'" that the relator, on or before the 10th day, being the second Monday, of July, 1872, deposited in the office of said secretary, a sealed proposal for the printing of said documents, and the same was set out in *hæc verba*; that Camp & Cummings, of Newport, Vt. on or before said 10th day of July, deposited in the office of said secretary their sealed proposal for printing a part only of said documents, and the substance of said proposal was set out, and wherein it differed from the relator's proposal; that no other proposals for said printing, or any part thereof, were deposited in the office of said secretary on or before said 10th day of July, by any person.

The petition further alleged, that it therefore became and was the duty of said secretary, and of Whitman G. Ferrin, state auditor, on the third Monday of said July, at one o'clock in the afternoon, at the office of said secretary, according to the statute in such case made and provided, to publicly open and examine said



sealed proposals so as aforesaid deposited in the office of said secretary, and none others, and therefrom to select and accept the one most advantageous to the state, and to at once notify the party making such proposal of its acceptance, and close the contract, and require and take a sufficient bond for the performance thereof; but that the respondents refused so to do, but, on the contrary thereof, at the time and place last aforesaid, proceeded to examine, in addition to said sealed proposals, divers unsealed proposals for said printing, which were not deposited in the office of said secretary until after said 10th day of July, and not until said third Monday of July, and accepted one, or more, of said last named proposals, and refused to accept, either the proposal of the relator, or of the said Camp & Cummings, although especially requested by the relator at the time and place last aforesaid, to confine their examination of proposals to those deposited in the office of said secretary on or before the said 10th day of July as aforesaid, and to accept therefrom the one most advantageous to the state, and to at once notify the party making the same of such acceptance, and require and take a bond for the performance of the contract, which the respondents refused to do. The relator prayed for a writ of mandamus to issue against the respondents, commanding them as stated in the opinion.

The answer admitted the truth of all the allegations of fact in said petition, except it denied that the proposals of Willard & Wheelock, hereinafter mentioned, were unsealed at any time prior to their examination as hereinafter stated, and alleged, among other things not necessary to be stated, that since the passage of said act of 1867, it had always been customary and the practice to receive and act upon all bids and proposals received by the secretary of state before the time fixed by said act for opening and examining the same, and that it was so understood by a majority of bidders; that on the morning of July 8, 1872, J. W. Wheelock, of Montpelier, of the firm of Willard & Wheelock, made out and sealed written proposals for all of said printing, and repaired therewith to the office of the said secretary in Montpelier, which was in charge of G. W. Wing, Deputy Secretary of State, (the said secretary residing at Northfield, where he also had an

office,) and there inquired whether his said proposals should be sent to said secretary at Northfield, or deposited there with said deputy, and that said deputy told him to keep them and deliver them to said secretary when he saw him at Montpelier; that relying thereon, said Wheelock did keep said proposals, sealed as they then were, until the morning of the third Monday of July aforesaid, when he delivered the same to said secretary, at Montpelier; that the firm of J. & J. M. Poland, of Montpelier, had obtained state printing before the year 1872, and had made proposals which had been accepted, and in former years said secretary had informed them that they need not present their proposals until the day fixed for opening and examining proposals, and that said Polands, each year after the passage of said act, in common with a large majority of bidders under said act, and acting under the direct information of said secretary, delayed presenting their proposals until the day of the opening thereof, and in the year 1872, relying upon such information, and upon said practice, delayed presenting their proposals for said printing till the said third Monday of July, at one o'clock in the afternoon, at which time they presented their proposals to said secretary in his office in Montpelier, inclosed in an envelope, but not sealed. The answer further alleged, that at the time and place last aforesaid, the respondents proceeded to open and examine all proposals received as aforesaid up to that time, and then and there awarded a portion of said printing to the said Polands, and the remainder thereof to the said Willard & Wheelock, the lowest bidders therefor, and at once closed the contract with each of them according to said act. The answer further alleged, that said advertisement did not comply with said act, in that it did not state various matters required thereby to be stated therein, and especially in that it did not state that said proposals must be deposited in the office of said secretary on or before the said 10th day of July, and insisted that therefore all proceeding thereunder were void, and that the bidders acquired no right thereunder; and also alleged that the proposal of the relator was materially altered by the relator, with the consent of said secretary, by reducing the price of binding, after the same was opened and examined as aforesaid on said third Monday of July, whereby

said proposal became and was a new proposal, unsealed, and not deposited in the office of said secretary on or before said 10th day of July, and that the relator's original proposal was thereby in effect withdrawn. The answer further alleged that the relator deposited no bond with said secretary on or before the first day of August, 1872, as required by said act, and insisted that the respondents had the right to reject any or all proposals, as might be deemed for the interest of the state, and that they had the discretion under the provisions of said act, to accept the proposals most advantageous to the state, whether the same were deposited on or before said 10th day of July, or not until the time fixed for opening and examining the same, and whether sealed or not. It was admitted that the matters of fact alleged in said petition were true, except as to the alleged interview between the said Wheelock and said Wing, and as to the proposals of the said Willard & Wheelock being and remaining sealed until opened by the secretary of state, which said last named allegations the testimony on the part of the defendants tended to prove. It was also admitted that the saving to the state by the acceptance of the proposals of the said Polands and of the said Willard & Wheelock, was two thousand dollars.

*Wm. G. Shaw*, for the relator.

I. The act relating to state printing (No. 61 of 1867) is mandatory upon the auditor and secretary of state, and requires them to open and examine only such sealed proposals as have been deposited by the 10th of July, and from them alone to accept the one most advantageous to the state. While they are granted full discretion in respect to which proposal is the most advantageous, a discretion with which no court will interfere by mandamus, they have no discretion in regard to the extent of their jurisdiction, or the proposals they are to examine and select from. While the language of the first section *literally* refers only to the requirement of the *advertisement*, there can be no doubt that the Legislature intended to require that the proposals themselves should be deposited by that time. Otherwise they would not have commanded the secretary to publish an advertisement *requiring*

that the proposals "*must*" be deposited by that day. The requirement of the advertisement is the requirement of the law. The language of the second section, "*said sealed proposals*," renders the question certain, by indicating that the proposals to be examined are those mentioned, or referred to, in the first section. Neither in the first section, nor elsewhere in the act, is there any provision for furnishing proposals at all, except in the regulations for the terms of the advertisement, and the order that the printing shall be done under the regulations of the act. All the authority for depositing proposals, is therefore contained in the first section, and there can be no doubt that the proposals embraced by that section, are proposals deposited by the 10th of July. The remainder of the law is not in the least inconsistent with this view, but confirms it, both in the second section in the use of the words, "*said proposals*," and in the third section by the words, "*the next best proposal in accordance with the provisions of this act*." If the auditor and secretary examine and select from proposals deposited after the 10th of July, they not only do so without any authority, but also expressly violate the law upon that subject. The evident object of the law favors this construction. The legislature thought that economy, thoroughness, and despatch in the public printing, would be subserved by a *regular system*, throwing it open to general competition, giving all parties, both near to and remote from the capital, a fair and equal chance, and preventing the awarding officer from exercising any favoritism; and to accomplish this object, the Legislature prescribed a system of sealed bids, to be deposited by a fixed period anterior to the day of decision. The provision as to the time of depositing the proposals, is no less imperative than the one requiring the proposals to be sealed. If the awarding board can dispense with the one, they can disregard the other, as indeed they have in this case, in receiving, examining, and accepting the bid of the Messrs. Poland. The provision in regard to what bids the board shall examine is of the very *essence* of this act. It relates to their *jurisdiction*. It is more than a mere mode of procedure, or the appointment of a time. Provisions of the latter kind are frequently held directory, but clauses which are *fundamental* to the statute, which are

the essence of the thing sought, which confer jurisdiction, are always imperative. No law exists besides the statute of 1867, which makes any provision for the public printing—and without this statute none can be legally done. As the sole authority for having any public printing done, is found in this act, the provision about what proposals shall be examined, seems to be a limitation of jurisdiction, and not merely directory. While a statute regulating the details of procedure in an election, the counting and certifying of votes, or such matters, might be held to be directory, no such construction could be put upon a statute prescribing from what class of men, or from what locality, an officer should be chosen. *Briggs v. Georgia*, 15 Vt. 61. Statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than substance. *People v. Schermerhorn*, 19 Barb. 558. If a statute imposes a duty and gives the means of performing that duty, it must be held to be mandatory. *Veazie v. China*, 50 Me. 518.

II. If the law is mandatory, the remedy by petition for writ of mandamus is the proper one. *Richard v. Wheeler*, 2 Aik. 369; *People v. Cortelyou*, 36 Barb. 164; *Griffith v. Cochrane*, 5 Binn. 103; *Delaney v. Goddin*, 12 Grat. 266; *Ex parte Caykendoll*, 6 Cow. 52; *State v. Hastings*, 10 Wis. 518; *Citizens' Bank v. Wright*, 6 Ohio State, 318; *People v. Contracting Board*, 20 Howard, (N. Y.) 212. It does not follow, even if the statute is *directory* merely—that is, that the disregard of its provisions would not render the acts of the board entirely *void*—that a seasonable petition for a writ of mandamus to compel them to follow even the *directory* provisions, would not be granted.

III. The form of the advertisement is substantially in accordance with the law. It refers to the law itself for details—and so the form of the statute becomes part of the advertisement. But the neglect of the secretary to comply with the law in respect to the advertisement, cannot excuse the examining board from obeying the other provisions of the statute. One error does not legalize another. The law is conclusively presumed to be known by every one; and the bidders would be governed by it in

making their proposals; and those who complied with the law could not be deprived of the rights given them by that law, on account of the neglect of the secretary.

IV. The erroneous practice of the board in 1868, 1869, and 1870, in receiving bids after the 10th of July, has no effect either upon the duty of the board, or the rights of the bidders.

V. Neither is the statute nullified, nor the rights of bidders under it, lost, because the board neglected to do their duty on the third Monday of July. If it was their duty to obey the law on that day, that duty still continues, notwithstanding that day has passed. Within the general purpose of the statute there is still ample time to exercise their judgment upon the proper subject-matter, and secure the seasonable execution of the state printing. Suppose the board had entirely refused to act on the third Monday of July, would not the court grant a mandamus to compel them to act after that time? *People v. Supervisors of Chenango*, 4 Seld. 318.

VI. The petitioner had no occasion to file any bond until its proposal had been accepted and notice to that effect given to it.

VII. The alteration of the petitioner's proposal, after it had been, with the other proposals, opened and examined, by a reduction in the price of binding, does not affect the case.

VIII. The proposals of Willard & Wheelock were not deposited in the office of the secretary of state until the 15th of July. What took place between Wheelock and Wing, was not equivalent to a deposit. The law provides, in effect, that the proposal *must* be so deposited by the 10th of July. This imperative requirement of the law could not be waived by the secretary or auditor, much less by the deputy secretary.

IX. Even though the relator may have a right of action against the members of the examining board for their neglect of duty, (which is uncertain,) yet the remedy by such an action is of such doubtful and uncertain character, and so different in its results from that given by *mandamus*, and so entirely inadequate, as not to supersede the latter remedy. 3 Bl. Com. 110; *People v. Mead*, 24 N. Y. 120; *McCollough v. Mayor of Brooklyn*, 23 Wend. 458;

*People v. Supervisors of Columbia Co.* 10 Wend. 363; *Strong, Petitioner*, 20 Pick. 497.

*Heaton & Reed*, for the respondents.

I. The act of 1867 is peculiar. It requires the advertisement to state the time of depositing the proposals. It does not require the proposals to be deposited at that time. It does not forbid their being acted on, if deposited before the opening. The construction claimed might defeat one of the most important objects of the law. But all these provisions are for the benefit of the state, and confer no rights till acted on.

II. This is not a case where the board has refused to act. It has acted, exercised its discretion, decided and awarded. And there is no precedent where this writ has been granted in such case. *People v. Contracting Board*, 27 N. Y. 378; *State v. Commissioners of Printing*, 18 Ohio State, 386; *State v. Board of Education*, 24 Wis. 683.

III. Action under this statute, involves judicial decision and discretion, both as to what proposals to act upon, and as to which is most advantageous to the state. In such cases, *mandamus* does not lie. *Moses on Mandamus*, 65, 67, 70, 77, 78, 82, 83; *Kendall v. United States*, 12 Peters, 524; *Decatur v. Paulding*, 14 Peters, 497, 515; *Reeside v. Walker*, 11 How. 272, 290; *State of Ohio v. Chase*, 5 Ohio State, 529; *Marbury v. Madison*, 1 Cranch, 170; *United States v. Guthrie*, 17 How. 284.

IV. This is substantially a petition for a *mandamus* to compel a state officer to make a contract. This has never been allowed. *Moses on Mandamus*, 124, 134-5-6; *People v. Croton Aq. Board*, 26 Barb. 240; *People v. Canal Board*, 13 Barb. 432.

V. The provisions of the statute as to the time of depositing the proposals, can be no more than *directory*. Sedg. Stat. Law, 368 *et seq*; Smith's Com. 670, 679, 680, and cases cited; *Colt v. Evans*, 12 Conn. 243, 254, and cases cited; *People v. Allen*, 6 Wend. 487; *People v. Supervisors of Ulster Co.* 34 N. Y. 268; *Evans v. Chapin*, 20 How. Pr. 289.

VI. The advertisement itself is defective. And if these state officers cannot act lawfully except with the strictness required by

the relator, then the whole proceedings are irregular, and no rights can be acquired under them.

VII. The bid of the relator, as amended after it was opened, was not in fact a better compliance with what is claimed to be the law by the relator, than the bids of Willard & Wheelock and J. & J. M. Poland, on which the state printing was awarded by respondents.

VIII. The issuing of this writ is matter of judicial discretion. *Ex parte Fleming*, 4 Hill, 581 ; *People v. Dowling and Kelley*, 37 How. Pr. 394.

IX. It can hardly be claimed that the relator has a clear absolute right by the laws of the land to the object of his prayer. *People v. Supervisors of Chenango Co.* 1 Kernan, 563, 574 ; *Kellogg v. Page*, 44 Vt. 356.

The opinion of the court was delivered by

ROYCE, J. The petition of the relator is for a writ of mandamus to issue against the defendants, commanding them to examine the sealed proposals for the state printing which were deposited in the office of the secretary of state on or before the 10th day of July, 1872, and none others, and therefrom to accept the one most advantageous to the state, and at once thereafter notify the party making such proposal, and close the contract for said printing in accordance with such proposal so accepted, and that such further order may be had in the premises as justice may require.

One of said proposals was deposited in the office of the secretary of state by the relator, and the object of the relator is to compel the defendants to examine and act upon said proposal in exclusion of all others not so deposited. This petition was served on the 29th of July, 1872, and it is admitted that the contracts for the state printing were awarded to J. & J. M. Poland and Willard & Wheelock on the 15th day of July, 1872, at an expense of at least \$2,000 dollars less than the proposal made by the relator and that made by Camp & Cummings, which were the only ones that the relator claims the defendants had the right to consider and act upon. If the defendants had the legal right to award the contracts, their power and authority over the subject was exhausted when the



awards were made, and this would be conclusive of the relator's right. In considering this question, it becomes important to enquire what construction should be put upon the act of 1867 under which the parties acted. The first section requires that the secretary of state, on the first week in June, shall advertise in one weekly newspaper in each county where there is one printed, for sealed proposals. This requirement is mandatory upon the officer. It is positive and certain, and leaves nothing to his discretion. It then provides that said advertisement shall state the matter to be printed, and the form and style of the same, and when to be completed, and that said sealed proposals must state the character of the work proposed to be done, and must be deposited in the secretary of state's office on or before the 10th day of July thereafter.

The second section provides that on the third Monday of July in each year, the secretary of state and the auditor of accounts shall publicly open and examine said sealed proposals, and shall accept the one most advantageous to the state.

Courts in construing statutes are to give effect to the intent of the law-making power, and are first to seek for that intent in the words and language employed, and if this is free from ambiguity, and expresses clearly the sense of the framers, there is no occasion for resorting to other means of interpretation; but when the sense is not thus expressed, the intent is to be deduced from the context, the occasion and necessity for the law, the mischief felt, and the object and remedy in view.

Previous to the statute of 1867, the secretary of state was required, between the first days of June and August, to receive proposals for printing such matter as was required to be published, and was to contract with such person or persons as should offer the best terms. He was not required to advertise for proposals, and was constituted sole judge as to what proposals he would receive and act upon in awarding contracts.

One of the mischiefs of the law was that there was no compulsory mode provided of giving general notice that such contracts would be made, and the objects and remedies proposed by the act of 1867 were, by compelling the advertisements, to induce compe-

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tition, and thus secure the execution of the work at a reasonable price, and to protect those who might bid for the work against favoritism by the officers whose duty it would be to award the contracts. The principal object of the law was to benefit the state. Where the terms of a statute leave room for any administrative discretion to be exercised, it cannot be interpreted to be mandatory. Potter's Dwaris, '222, and note 29. And a statute directing the mode of proceeding by public officers, is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute. *People v. Cook*, 8 N. Y. 67.

The requirement in the advertisement as to the time when proposals were to be deposited in the secretary's office, was not intended as a limitation of power upon the part of the officers in examining and acting upon proposals. The *essence* of the thing required to be done by the secretary of state and auditor of accounts was, that they should, on the third Monday of July, accept the proposal most advantageous to the state. It stands admitted that this duty was performed.

The writ of mandamus is subject to the legal and equitable discretion of the court, and ought not to be issued in cases of doubtful right. *Life and Fire Insurance Co. v. Wilson's Heirs*, 8 Peters, 291. And in this case we think the writ should not be awarded. The petition is dismissed with costs.

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M. N. KENT v. MURRAY BUCK.

*Deposition. Evidence. Conditional Sale.*

Notice was given to take the deposition of Mrs. J. V. Perley. The deposition was signed by Emily A. Perley, who was the wife of J. V. Perley, and the same person named in the notice, which the party notified knew. *Held*, that the deposition was not thereby rendered inadmissible.

The admissions of a party are admissible against him.

The conditional vendor of personal property can recover for injury thereto, although not entitled to the possession thereof at the time of the injury.

**TROVER** for a mare, with a count in case to recover for the imprudent management of said mare, whereby she died. Trial by jury, September term, 1871, PECK, J., presiding.

The plaintiff claimed title to said mare by virtue of a conditional sale thereof by him to one J. V. Perley.

The court charged the jury, among other things not excepted to, that it was not necessary, to entitle the plaintiff to recover under the count in case, to show that the plaintiff was entitled to the possession of the mare at the time of the act and injury therein complained of; and that if the plaintiff only recovered for driving the mare imprudently after the defendant took her, he could recover such damages as the jury found were the consequence of such driving; to which the defendant excepted. The other points of exception taken by the defendant appear in the opinion.

The opinion of the court was delivered by

ROSS, J. The plaintiff gave the defendant notice to be present at the taking of the deposition of Mrs. J. V. Perley. The deposition is signed by Emily A. Perley. The defendant objected to its use for the reason it was signed by a different name than the one inserted in the notice served on him. Emily A. Perley is the wife of J. V. Perley, and the defendant understood that he was notified to be present at the taking of her deposition, so that he has not been misled as to the person whose deposition was to be taken. The only provision of the statute relating to the notice to be given in such cases, Gen. Stat. 324, sec. 6, speaks of the person whose deposition is to be taken as a "witness." When the person whose deposition is to be taken is clearly pointed out in the notice, we think the spirit as well as the letter of the statute is complied with. If the person is known and designated equally well by either of two names, the party giving the notice may use whichever he chooses, and if the witness prefers to sign the other name and does sign it to the deposition, it will not render the deposition inadmissible.

The defendant excepted to the court's ruling, allowing certain parts of said deposition to be read to the jury. No ground of objection is stated in the exceptions, but in the argument the de-

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defendant urges that those portions of the deposition are inadmissible on the ground that the deponent stated what others had told her, and not what she saw or knew personally. The deponent says, in the instances objected to, she knew the facts she details in one instance, "because I heard him (defendant) and my husband talk it over." In another instance, the witness says, "While at Morrisville the mare was fed, but refused to eat, as I heard. Mr. Buck and Mr. Perley talked it over." It is true the witness stated what she heard, and if it had not been what she heard the defendant say, it would have been objectionable as hearsay, but inasmuch as she heard it from the defendant, it is admissible against him as an admission.

The defendant has made no point in the argument in regard to his exception to the charge of the court, and we discover no error in that portion of the charge to which exception was taken.

Judgment affirmed.

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### SOLON S. SPALDING v. TOWN OF WAITSFIELD.\*

#### *Soldier's Bounty.*

The books and records in the office of the adjutant general of the state, and not the date of muster-in, control as to who apply on the quota of a town under a given call, so as to entitle them to a bounty under the vote of the town to pay a bounty to those who should enlist and be credited to the town on their quota under such call. *Vide Bucklin v. Sudbury*, 43 Vt. 700.

ASSUMPSIT to recover a town bounty. Plea, the general issue, and trial by jury, March term, 1870, PECK, J., presiding.

October 17, 1863, the president of the United States called for 300,000 men. The quota of the town of Waitsfield under said call was fifteen men. At a legal town meeting held on the 27th November, 1863, the town passed the following resolution:—

"Resolved, 1st, That the selectmen be instructed to pay by "their order on the town treasury the sum or bounty of three

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\* This case was heard at the August term, 1870, and held for advisement till the general term in November, 1871.

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"hundred dollars to each recruit belonging to this town, who shall enlist under the recent call of the President of the United States for 300,000 volunteers, and shall be credited toward our quota of said call as assessed by the governor and adjutant general of this state in General Order No. 2, dated Nov. 2, A. D. 1863, said bounty to be paid when the said recruit is mustered into the service of the United States."

In the summer of 1861, the plaintiff lived in Waitsfield, and enlisted for said town in the 6th regiment Vt. volunteers, to serve three years. On the 27th November, 1863, the plaintiff was with his regiment at Brandy Station, Va. About the 8th or 10th of November, 1863, one of the selectmen of Waitsfield, having heard that an opportunity had been offered to the soldiers already in the service in the field, who had served two years or more, to re-enlist, immediately wrote to Lieut. Bushnell, who also belonged to Waitsfield, and was an officer in the company in which the plaintiff was then serving, that Waitsfield had got to raise more soldiers, and asking him to see the soldiers of his company, and ascertain if there were any who would re-enlist to the credit of the town, and to ask them if a bounty of from \$100 to \$200 would be any inducement to them to re-enlist. On receipt of said letter, Bushnell informed the men of his company, of whom the plaintiff was one, of its contents, and asked them to re-enlist for Waitsfield. But the men gave no encouragement that they would, and Bushnell wrote the selectman about the 14th November, that he could get no encouragement from his men that they would re-enlist, and that he thought the bounty would make no difference. But Bushnell did not inform the plaintiff, or any of his men, what answer he made to said letter. Bushnell's letter was read at said meeting, before the vote was taken. About the 1st December, 1863, the plaintiff learned from letters he and other soldiers received from home, that Waitsfield was paying a bounty of three hundred dollars for men to serve on their said quota. It was also known to the plaintiff that other towns in Vermont were paying bounties for soldiers, some of them as high as four or five hundred dollars. Knowing the above facts, and Bushnell telling his men that he thought Waitsfield would pay as large bounty as other towns, on the 16th December, 1863, the plaintiff, having then

served in the army some over two years, re-enlisted for three years, at Brandy Station, Va., and was on the same day mustered into the service, and set to the credit of Waitsfield, to apply on said quota, with the expectation of receiving a bounty from the town. Afterwards the plaintiff, with seven others who re-enlisted at the same time, all received a furlough for thirty days, and started for home January 1st, 1864. On the 15th of January, 1864, the plaintiff notified the selectmen of Waitsfield that he had re-enlisted to the credit of the town, and demanded a bounty. These eight men who re-enlisted, and of whom the plaintiff was one, were the first men mustered into the United States service to the credit of the town, after said call, and the first men mustered, after said vote, to apply on the quota of the town, as assessed by the governor and adjutant general of the state, in General Order No. 2, dated Nov. 2, 1863. On the 18th December, 1863, the town caused eight men to be mustered into the service on their said quota, and on the 25th December, 1863, four more men were mustered. On the fifth January, 1864, one of the selectmen was on his way to Brattleboro, with the last two men whom he had enlisted, to have them mustered in; and when he got to Roxbury, he was told that eight veterans had got off the cars at Roxbury, and gone home to Waitsfield, on a furlough, and that Capt. Crane, their captain, was aboard the train which he was then on; and he sought out said Crane before he got to Brattleboro, and learned from him that eight men had re-enlisted in the field, of whom the plaintiff was one, and been mustered in, to the credit of Waitsfield; and this was the first knowledge the selectmen had of the plaintiff's re-enlisting for the town. The selectman then requested one, or both, of his said recruits, not to go on to Brattleboro, but to return and let some of the veterans take their place. But one of them was mustered in on the 6th of January, and the other on the 8th.

It appeared that the muster-in rolls of the said eight re-enlisted men were not received at the adjutant general's office until the last days of January, 1864. At that time, the selectmen had raised seventeen men, besides the eight re-enlisted men, and paid them the bounty of \$300 each. It appeared that the soldiers whom the

selectmen enlisted at-home were credited at the adjutant general's office prior to any of the eight re-enlisted men. But it was not claimed that the re-enlisted men were in any way negligent in the matter, or that it was owing to any neglect of theirs that the muster-in rolls were not received earlier at the adjutant general's office.

Gen. Peck, assistant adjutant general of the state, testified, that he knew of no books and records where the towns had their accounts kept of debt and credit as to soldiers, except in the adjutant general's office, and that by the books and records in that office, the plaintiff applied and was counted upon the call of the president of July 18th, 1864.

The next call of the president, after the call of October 17, 1863, was February, 1864. On this call, Waitsfield's quota was six men. The town had, besides the eight re-enlisted men, two surplus men, who, with four of the re-enlisted men, balanced said quota. On the 14th of March, 1864, another call was made, on which Waitsfield's quota was seven. That call was to equalize the draft of July, 1863; Waitsfield had eight men drafted, who were first, and before any other credits, applied in extinguishment of said quota, leaving one surplus man, who, with the last four of the eight veterans, of whom the plaintiff was one, was applied on the call of July, 1864.

The plaintiff offered to prove that that the town of Waitsfield paid bounties to soldiers to fill their quota on other calls after the call of October 17th, 1863; to which the defendant objected; which objection was overruled by the court, and the testimony received, to which the defendant excepted. The testimony showed that the town did pay bounties to fill its quotas on the calls after they had filled the quota under the call of October 17, 1863, and that to fill such quotas it paid not less than \$300 to any one. After the testimony was closed, there was no dispute about the facts.

The court directed a verdict for the plaintiff.

*Clough & Carleton*, for the defendant.

*T. J. Deavitt*, for the plaintiff.

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 Whitcomb v. Cardell.
 

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BARRETT, J. In this case the court entertained the views embodied in the opinion drawn up in the case of *Bucklin v. Town of Sudbury*, argued at the general term in November, 1871. The judgment is therefore reversed, and cause remanded.

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JONATHAN WHITCOMB v. EDWIN CARDELL.

*Agency. Attachment.*

On the 7th of May, 1853, the plaintiff let J., his brother, have \$1,500 in money and goods, and by a power of attorney appointed J. his attorney, to buy and sell real and personal property, or to exchange, or trade in, any kind of goods, or to transact any kind of business, in his name, to the amount aforesaid, and thereby authorized J. to use the profits and interest of said sum, from day to day, for his comfort and support, as a compensation for his labor as such attorney. J. received said sum in trust, to be delivered to the plaintiff on demand, and expended most of it in the purchase of a farm and the erection of buildings thereon, which he occupied and carried on, and took the profits thereof to himself, except that occasionally the plaintiff had small sums arising therefrom, but not exceeding three or four hundred dollars in all, and the balance J. expended for stock to put upon the farm. The farm, and personal property upon it, were always treated as the plaintiff's. The whole transaction between the plaintiff and J. was in good faith. On the 11th of June, 1870, the defendant attached, as the property of J., two cows and one heifer upon said farm, which were either purchased with the money so received by J., or sprung from those so purchased. *Held*, that said property belonged to the plaintiff, and was not liable to attachment as the property of J.

TRESPASS for two cows and one heifer. Trial by the court, March term, 1872, PECK, J., presiding.

The property in question was taken by the defendant as constable of the town of Warren, on the 11th day of June, 1870, by virtue of an execution against one Justus L. Whitcomb, a brother of the plaintiff, in favor of a creditor of the said Justus.

At the time of said taking, the property was upon a farm in said Warren, occupied and carried on by the said Justus. It appeared that on the 7th of May, 1853, the plaintiff was a man of large property, and resided in Littleton, Mass., and that the defendant was poor and destitute of property and means of support; that the plaintiff on that day, at Littleton aforesaid, without any pecuniary or other consideration, except to aid his brother in enabling him by his labor and industry to gain a living for himself



and family, put into his hands fifteen hundred dollars in goods and money, but principally in money, on the terms specified in a written power of attorney, executed at the same time, and said Justus at the same time executed a receipt to the plaintiff for the same; that under this arrangement and understanding, the said Justus, in behalf of the plaintiff, purchased a piece of land in Warren, sufficient for a small farm, at the price of \$762, which was paid for out of the said \$1,500, and the residue of the \$1,500 was expended in erecting a house and necessary out-buildings on the premises (there being no buildings on the place when purchased as aforesaid), except a small portion of it, which was laid out to purchase a little stock to put on the place, and perhaps a trifling sum for farming tools to use on the place. The \$1,500 not being quite sufficient for this purpose, a small mortgage was executed on the premises for the balance. The said Justus, as soon as he could get the necessary buildings erected, moved on to the premises and has occupied them with his family ever since, under the power of attorney aforesaid, the plaintiff and said Justus always treating the farm, and the personal property upon it, as the property of the plaintiff,—the said Justus and his family carrying on the place with their own labor, and living upon the products thereof. In the mean time, the plaintiff had out of the avails of the products of the place, small sums occasionally, not exceeding in all from three to four hundred dollars, which were partly in money and partly in cattle raised on the place during the time the said Justus was carrying it on; and in the mean time the plaintiff, at his own expense, had sent from Massachusetts, where he resided, a mowing machine of the value of \$100, or more, for the use of the farm, which the said Justus ever thereafter used thereon. It appeared that from the time of the purchase of the place, to within a few years, the premises, and all the stock and property on the farm, were set in the grand list to the plaintiff, and the said Justus paid the taxes out of the proceeds of the farm, he having no list of his own except his poll. It also appeared that a few years before the taking complained of, one of the listers suggested to the said Justus that, to save having but one list, it would be more convenient to have the whole list set to him; and at the lister's suggestion and request,

the said Justus consented, and it was so done, and had been so done from that time to the time of the taking of the property in question. It did not appear that this was done with the knowledge or consent of the plaintiff. It appeared that when the cows and heifer were sold on the execution, the said Justus procured a neighbor to bid them off, with the privilege of redeeming them, and the neighbor bid them off accordingly, and paid to the defendant the amount of the bid, and the cattle were not taken from the place; and subsequently the said Justus, in behalf of the plaintiff, paid to the man who bid them off, a part of the sum he had paid to the officer out of money derived from the proceeds of the farm, and after that the plaintiff came up to his brother's, and paid to the man, out of his own moneys in no way connected with the farm or its proceeds, the residue of the amount paid to the officer, and also paid him \$5 or \$10 for his trouble in the matter. After the purchase of the farm, the plaintiff had been in the habit of visiting the place occasionally, once in a few years; but he and his brother had never had any settlement in relation to the matter of the \$1,500, or as to what had been done under the power of attorney. There was testimony that the premises were worth \$1,800 or \$2,000 at the time of trial, but that they could not be sold for that sum. The court found the premises worth at that time about \$1,800. The three cattle in question were all the live stock on the farm at the time it was attached, except one cow. There were some farming tools on the place, and a little other personal property necessary for carrying on the place, but not of any great value. The cattle in question were raised from a cow which the said Justus bought and paid for out of the \$1,500 received of the plaintiff, except one of the cows, which he either bought and paid for out of the proceeds of the farm, or raised from a cow he so bought. When the defendant took the property, the said Justus told him it belonged to the plaintiff.

It appeared that if the plaintiff should take the premises at the present value, and all the personal property, including that in question in this suit, it would not, with all he has received from the said Justus, pay him for his \$1,500 and interest, but he would be out of pocket in the matter. The court found that the whole

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 Whitcomb v. Cardell.
 

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transaction between the plaintiff and said Justus was in good faith. The defendant's counsel claimed that the property in question was attachable, and subject to be levied on as the property of said Justus, upon the ground that all the property there over and above \$1,500, was attachable as his property; but the court found and decided otherwise, and rendered judgment for plaintiff; to which the defendant excepted. The judgment was not for the full value of the property, but only for what was necessarily paid to redeem it from the execution sale, and interest.

The following is a copy of the power of attorney and of the receipt above mentioned :

"Know all men by these presents that I, Jonathan Whitcomb, of Littleton, in the County of Middlesex, and State of Massachusetts, do hereby make, constitute, and appoint, Justus L. Whitcomb of said Littleton, my true and lawful attorney, for me, and in my name, to buy and sell real and personal property, or to exchange, or trade in, any kind of goods, or to transact any kind of business in my name, to the amount of fifteen hundred dollars, which is the sum in money and goods that I have put into his, the said Justus', care and keeping for his convenience in living and enjoying the comforts of life, which he is to have only from day to day out of the profits or interest of the above sum, which is to be his pay for the labor of the above care, &c.; hereby ratifying and confirming whatsoever my said attorney shall lawfully do or cause to be done in the premises from this date.

Witness my hand and seal this seventh day of May, 1853.

JONATHAN WHITCOMB, [L. s.]

*Signed, sealed and delivered,  
in presence of*

WILLIAM KIMBALL, }  
DANIEL BOLLES. }

MIDDLESEX, ss. May 7th, 1853.—Then personally appeared the above Jonathan Whitcomb, and acknowledged the foregoing to be his free act and deed before me,

DANIEL BOLLES, *Justice Peace.*"

"LITTLETON, May 7, 1853.

Received of Jonathan Whitcomb fifteen hundred dollars in money and goods in trust, which I agree to deliver to, or let him take possession of, whenever he, the said Jonathan, shall demand the same.

[Signed] JUSTUS L. WHITCOMB."

*Clough & Palmer*, for the defendant.

*Geo. M. Fisk*, for the plaintiff.

The opinion of the court was delivered by

REDFIELD, J. The power of attorney and the receipt were executed at the same time, and are to be construed together. They, together, show that the plaintiff put into the hands of his brother, Justus L., \$1,500 to be held "in trust," and to be returned "on demand," with the *duty* to take care of it, invest, and exchange, and improve it; and with the *right* to live, and "enjoy the comforts of life," "only from day to day out of the profits or interest of the said sum." The animals attached by the defendant were either purchased with that money, or sprung from those so purchased. They were the property of the plaintiff. The contract and relation being found *bona fide*, with no taint of fraud, the *title* of the property, and its increase, remains in the plaintiff. And the attachment and sale, as against the plaintiff, was a trespass.

Judgment affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF LAMOILLE,  
AT THE  
AUGUST TERM, 1872.

PRESENT :

HON. ASAHEL PECK, HON. HOYT H. WHEELER, HON. HOMER E. ROYCE, HON. JONATHAN ROSS,	}	ASSISTANT JUDGES.
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JOHN MASON AND VERGINA MASON v. ELIAKIM FULLER.

*Evidence. Expert.*

A woman who has had experience as nurse in childbirth, and, as such, been in attendance at premature births, may testify as an expert to her opinion as to whether the birth of a child was premature.

A witness testified that her husband died at a certain time, but that she was not with him when he died, nor present at his burial, and had no personal knowledge of his death, and only knew it from what his folks had told her and written her. *Held*, that the testimony was competent proof of the fact of death.

THIS was a complaint for bastardy, made by the said Vergina by the name of Vergina Vine, dated in January, 1871, wherein she represented herself as a single woman. The case was entered

at the May term, 1871, and continued to the December term following, at which term it was tried by jury upon the general issue, REDFIELD, J., presiding.

Before trial, John Mason, by leave of court, entered as a party plaintiff, as the husband of said Vergina. The said Vergina testified on cross-examination as follows:

"I was married to my first husband, Edward Vine, some fourteen years ago, and lived with him nine years in Bakersfield. He then went off, and I have not seen him since. He said he was going to St. Albans, when he left. My husband died two years ago last March. I was not with him at the time of his death, or present at his burial, and have no personal knowledge of his death; I only know it from his folks telling me and writing me. They wrote me three letters this winter, and his brother told my husband."

She also testified, that she was married to John Mason, her present husband, in the early part of October, 1871. There was no other testimony as to the death of her said former husband. After the testimony was closed, the defendant requested the court to order a verdict for the defendant, because there was no legal evidence of the death of her said husband, Edward Vine; but the court refused the request, and submitted the case to the jury.

The defendant requested the court to charge that the said Vergina having testified to a former marriage, it was necessary, in order to entitle her to a verdict, that she should show by legal proof, the death of her said husband, Edward Vine; that her testimony did not amount to legal proof, upon which the jury could find the fact of death.

But the court upon this point charged as follows:

"The question is made, whether the said Vergina, at the time of conception and birth of the child, was a single woman. The only testimony upon this point, is from her, and you have to say whether this fact is, in your minds, established. When a woman comes into court for trial, the law will not presume any marriage,—she will be presumed to be single, in the absence of any evidence tending to prove a marriage."

To the refusal to charge as requested, and to the charge as given, the defendant excepted.

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Masons v. Fuller.

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Almira Adams was introduced as a witness on the part of the plaintiff, who testified that she was the nurse of said Vergina during her confinement; that she had acted as nurse in quite a number of cases, and had been in attendance where children were prematurely born. There was no testimony that she had read medicine, or had any knowledge upon the subject of medicine, except what she derived from her experience as nurse. The plaintiff asked her what her opinion was as to whether the birth of the said Vergina's child was natural or premature; to which the defendant objected, on the ground that she was not entitled to give evidence as an expert; but the objection was overruled, and the answer taken; to which the defendant excepted.

Verdict and judgment for the plaintiffs, and order of filiation.

*H. R. Start*, for the defendant.

The law does not presume a woman single when she comes into court to bastardize her issue; she must clearly prove, in making out her case, that she is single. There is error in the charge upon this point. Gen. Stat., 491, § 1, and 493, § 11; *Griffin v. Austin*, 8 Vt. 70. The remedy under the bastardy act is not given to all women, but to only a particular class of women, to wit, to single women; and the burden of proof was upon the complainant to show that she belonged to that class.

The evidence to prove the death of the former husband of the complainant, was hearsay. 1 Greenl. Ev. § 99; *Warner v. McGary*, 4 Vt. 507.

It was error for the court to allow Mrs. Adams to give her opinion as to whether the birth of the child was premature.

*McIntyre and Benton*, for the plaintiffs.

The testimony to prove the death of the former husband, comes within the qualification of the rule as to hearsay evidence, which allows the fact of death to be proved by hearsay or reputation. 4 Phil. Ev., Cowen & Hill's notes, 237 *et seq.*; *Webb v. Richardson*, 42 Vt. 465.

The admission of the opinion of the nurse as an expert, was proper. ——— *v. Harris*, 5 R. I. 243; *Fairchild et al. v. Bascomb et als.* 35 Vt. 398.

The opinion of the court was delivered by

WHEELER, J. I. The witness Almira Adams, by her experience and observation, appears to have acquired knowledge of the subjects about which she was testifying, that persons generally do not have. To the extent of this peculiar knowledge, she was a person of skill and science, and her opinion, founded upon it, was evidence competent to go to the jury. *Goodtitle v. Braham*, 4 T. R. 497; *Chaurand et al. v. Angerstein*, Peake, 44; 1 Phil. Ev. with Cowen & Hill's notes, 778.

II. So far as the defendant asked the court to charge that the plaintiff must show the death of her former husband, to entitle her to a verdict in her favor, the request appears to have been complied with. That part of the charge stated, in which the court told the jury that the law would not presume any marriage, but would presume a woman to be single, appears to have been stated with reference to a case where there was no evidence upon the subject of marriage one way or the other. Such a case would have been very different from this one; and the remark appears to have been made as an illustration merely, and not as a guide to the jury. Whether sound or erroneous, the remark would not injure the defendant. (The only question left, as to this part of the case, is whether the testimony of the plaintiff as to what her former husband's folks had told and written her about his death, was competent evidence of it. "Hearsay is good evidence to prove who is my grandfather, when he married, what children he had, &c.; of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relation beyond the sea, dead: and the common reputation and belief of it in the family, gives credit to such evidence." Buller's N. P. 294. Similar doctrine has been many times approved of and applied in England, and in the federal and state courts in this country. 1 Phillips' Ev. 269, Cowen & Hill's note, 97; *Webb v. Richardson*, 42 Vt. 465. This would seem to sustain the ruling of the county court in this respect.)

Judgment affirmed.



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**S U P R E M E C O U R T**  
**FOR THE**  
**COUNTY OF ORLEANS,**  
**AT THE**  
**AUGUST TERM, 1872.**

PRESENT :

HON. JAMES BARRETT, HON. HOYT H. WHEELER, HON. HOMER E. ROYCE, HON. JONATHAN ROSS,	}	ASSISTANT JUDGES.
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C. G. DROWN ET ALS. *v.* THE TOWNS OF BARTON, WESTMORE,  
AND SUTTON.

*Motion to Dismiss. Road Petition under § 64, ch. 24, Gen.  
Stat.*

The citation attached to a road petition brought to the supreme court under § 64, ch 24, Gen. Stat., must be to the defendant town ; and if only to the selectmen of such town, naming them, although properly served on them, the petition will, on motion, be dismissed.

THIS was an application to the supreme court under § 64, ch. 24, of the Gen. Stat., for laying out a highway through the towns of Barton and Westmore, in Orleans county, and Sutton in Caledonia county. The facts sufficiently appear in the opinion of the court.

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Drown et als. v. Barton, Westmore, and Sutton.

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*Edwards & Dickerman*, for the defendants.

The opinion of the court was delivered by

ROYCE, J. This was an application made to the supreme court under sec. 64 of chapter 24 of the General Statutes, for the appointment of commissioners to lay out a highway. The only summons which was served with the petition, was one directed to the selectmen of the defendant towns, naming them, and service was made on the first selectman in each of the towns in the order in which they were named in the summons. The defendants moved to dismiss the petition, for the reason that the defendants were summoned to appear in court in their individual capacities to answer to said petition, and because there was no summons attached to said petition, or otherwise, by which the defendant towns were called or cited in to answer to said petition.

The section of the statutes above referred to provides that when application shall be made to the supreme court, that court shall proceed in the same manner as the county court when the towns lie in the same county. Sec. 44 of the same chapter prescribes the mode of proceeding when application is made to the county court, and requires that the petition, with a citation, shall be served on one of the selectmen of each town, at least twelve days before the session of said court.

This being a statutory proceeding, all the substantial requirements of the statute must be observed, to give it validity. It is obvious that the object and purpose of requiring the petition and citation to be served, was to give notice to the parties to be affected by the proceedings. The parties are the defendant towns. The selectmen are not parties to the proceeding. They are designated as the persons upon whom service of the petition and citation is to be made, but this does not make them parties, any more than the town clerk is made a party by the service of papers against the town upon him.

The service seems to have been made in the manner required by the statute, but as there was no citation or summons to the defendant towns served with the petition, the petition for this reason must be dismissed with costs.

## SOLOMON M. FIELD v. JOHN HAMILTON.

*Contract. Surety.*

The plaintiff and M., partners, agreed between themselves that M. should pay the defendant for a pair of oxen which they had purchased of him. M. accordingly sent his note to the defendant in payment for the oxen, but the defendant refused to accept it, and demanded and received payment of the plaintiff. It was then agreed between the plaintiff and defendant that the defendant should hold M.'s note, and not let it be known that he had received payment for the oxen, and if M. ever paid anything on it, he should pay it to the plaintiff. M. subsequently paid \$86 on the note, not knowing that the defendant had received payment for the oxen. *Held*, that 'he plaintiff was merely surety for M., and as such, became entitled by subrogation to all the securities and avails of securities received by the defendant; that the defendant held M.'s note as security, and that the money paid thereon belonged to the plaintiff.

ASSUMPSIT for money had and received. The case was referred, and the referee reported substantially the following facts:

In the fall of 1861, and the winter following, the plaintiff and one McDuffie were partners in buying and selling cattle and sheep. In January, 1862, they, as such partners, purchased a pair of oxen of the defendant for \$170. McDuffie was present at the purchase, and had something to say about the oxen, and their value, but the defendant did not know they were partners, and supposed he was trading with the plaintiff individually. The oxen were soon after delivered, and received by said partners, but not paid for, and were sent to market, and the partnership received the avails thereof.

In March, 1862, McDuffie failed in business, and soon after, he and the plaintiff had a looking over relative to their partnership liabilities, and also relative to McDuffie's liabilities to the plaintiff. McDuffie then told the plaintiff he thought the defendant would take his individual note for the oxen and wait till he could pay it, and he agreed to send it to him. Of this understanding the defendant had no knowledge. Some time the last of April, 1862, McDuffie accordingly sent his note to the defendant for the price of the oxen, and wrote him at the same time, that he sent the note to pay for the oxen, and would pay it as soon as he could. The defendant was unwilling to accept the note, and in a few days went and saw the plaintiff and demanded pay for the oxen, and the plaintiff paid him.

The plaintiff at this time was owing considerably, and McDuffie's failure had embarrassed him, for he was not only liable to have to

pay the partnership liabilities, to some extent at least, from his private funds, but McDuffie was largely indebted to him, which he was quite uncertain of ever being able to realize much, if anything, from; hence he was anxious to avoid being sued by the defendant, lest a suit by him might induce his creditors generally to sue. These facts, connected with the fact that he was really liable to the defendant, induced him to settle with the defendant for the cattle that day.

The defendant had McDuffie's note with him at this time, and it was agreed between him and the plaintiff that he should continue to hold it, and should keep his own counsel and not let it be known that he had received pay for the oxen, and if McDuffie ever paid anything on it, he should pay it over to the plaintiff.

McDuffie remained largely indebted for several years after his failure. Finally, being somewhat prosperous in business, in the early part of 1867, he paid the plaintiff a certain per cent. of his indebtedness to him, and the plaintiff discharged him from all further liability. In April, 1867, McDuffie, not knowing that the defendant had received pay for the oxen, compromised with the defendant and paid him \$85 and took up his note. Some time before McDuffie compromised with the defendant, the plaintiff told the defendant to keep the note and keep still; that he thought McDuffie was coming around and he should get something on it yet.

At the time the defendant received the \$85, he intended to pay it to the plaintiff as agreed; but he soon heard flying reports that there might be something wrong about the transaction, and he thought he better hold the money till he became satisfied where it really belonged. In May, 1867, the defendant told the plaintiff he had the money, and said if he could ascertain that it would be right to pay it to him, he would do so. The plaintiff demanded the money of the defendant several times in 1867. After this suit was commenced, McDuffie told the defendant that he had settled with the plaintiff and paid him all up, and that the plaintiff had no claim to the money, and to use it in defending himself. The plaintiff introduced McDuffie's deposition, wherein he testified that he had no claim to the money in the defendant's hands.

At the September term, 1871, the court, REDFIELD, J., presiding, rendered judgment on the report for the plaintiff; to which the defendant excepted.

*H. C. Wilson*, for the defendant.

*J. T. Allen* and *J. L. Edwards*, for the plaintiff.

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Greenwood v. Smith.

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The opinion of the court was delivered by

WHEELER, J. The defendant is overpaid for his oxen, and therefore has money in his hands that does not belong to himself. By virtue of the agreement between the plaintiff and McDuffie, as between them, it was the duty of McDuffie to pay for the oxen, and as he has not overpaid, the excess does not belong to him. By virtue of the same agreement, the plaintiff was left to stand as a surety merely for McDuffie to the defendant on that debt, and when he paid the debt he became entitled, by subrogation, to all the securities and avails of securities which the defendant had, or afterwards received, on account of the debt. 1 Story Eq. § 499; *Miller v. Sawyer*, 30 Vt. 412. The defendant had the note of McDuffie as such security and afterwards received the sum of eighty-five dollars as avails of the note, and when he received this money, it belonged to the plaintiff.

What was said and done by the plaintiff and McDuffie about inducing the defendant to accept the note of McDuffie in payment for the oxen, can have no effect upon the rights of these parties, for the defendant was not so induced, and on the contrary required payment of the plaintiff.

Judgment affirmed.

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JACOB GREENWOOD v. DANIEL C. SMITH.

*Practice. Specification. Amendment.*

The plaintiff is not precluded by his specification from recovering upon a cause of action not included therein, but which is declared upon, and would be proper matter for specification, and grew out of the subject matter of the specification actually filed, if the defendant admits such cause of action on trial.

The amendment of specification, ordinarily rests in the discretion of the court, and is not the subject of exception.

ASSUMPSIT in the common counts. Plea, the general issue. Trial by jury, February term, 1872, REDFIELD, J., presiding.

The only item in the plaintiff's specification, filed by order of court, was for the price of a wagon sold by plaintiff to defendant.

It appeared without dispute that the plaintiff left said wagon with the defendant for sale, and that while in his possession the defendant used it and somewhat injured it. The plaintiff claimed that he left the wagon with the defendant upon such terms that the defendant might himself become the purchaser thereof, which the defendant denied. Some time after the wagon was injured as aforesaid, the parties had a negotiation about the same, and the plaintiff claimed, and his testimony tended to show, that the defendant then agreed to pay for the wagon; but the defendant claimed, and his testimony tended to show, that he only promised to pay the damage he had done to it, and that the plaintiff declined to fix any sum for such damage, and said that he would defer that till the wagon was sold.

The plaintiff requested the court to charge the jury, that he was entitled to recover in any event; that if they found the plaintiff's version of the transaction true, he was entitled to recover the price of the wagon; but if they found the defendant's version true, he was entitled to recover for the damage to the wagon. The court refused to charge as requested, but charged that the plaintiff was concluded by his specification, and could recover for nothing not included therein; to which refusal and charge the plaintiff excepted. Upon intimation by the court of such ruling, and after the testimony was closed, the plaintiff asked leave to amend his specification so as to include an item to conform to the testimony of the defendant. But the court refused to allow the amendment; to which the plaintiff excepted. The plaintiff requested to be allowed to submit to the jury the question of whether, upon the proof, he was not entitled to recover upon the defendant's promise to pay damage; but the court refused the request, and charged the jury that unless they found that the defendant agreed to purchase the wagon, their verdict should be for the defendant; to which the plaintiff excepted. Verdict for the defendant.

*Benton & Irish*, for the plaintiff.

There is no such variance between the specification and proof as will bar the plaintiff's right of recovery for damages as proved. *Brown v. Dennis*, 2 Wend. 593; *McNair v. Gilbert*, 3 Wend. 346;

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Greenwood v. Smith.

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*Williams v. Allen*, 7 Cow. 316; *Hess v. Fox, Exr.* 10 Wend. 436; *Stone v. Pulsipher et al.* 16 Vt. 428; *Porter et al. v. Munger*, 22 Vt. 191; *Martin v. Eames et al.* 26 Vt. 476; *Gay v. Cary*, 9 Cow. 44. If it appears from the defendant's own showing that the plaintiff is entitled to recover for items not included in the specification, he may recover for them. *Williams v. Allen, supra*; Colby's Practice, 202. Plaintiff is not bound by his account as proffered. *Reed v. Barlow*, 1 Aik. 145; *Loomis v. Barrett*, 4 Vt. 450; *Delaware v. Stanton*, 8 Vt. 48.

\_\_\_\_\_, for the defendant.

The practice has been uniform to treat the claim of the plaintiff as limited to his specification. *Lapham v. Briggs*, 27 Vt. 26; *Benedict v. Swain*, 43 N. H.; *Dean v. Mann*, 28 Conn. 352; *Davis v. Freeman*, 10 Mich. 188. The disallowance of the proposed amendment, was matter of discretion, and not revisable in this court.

The opinion of the court was delivered by

BARRETT, J. It is the office of the *specification* to define the ground of recovery which the plaintiff proposes to maintain by evidence to be offered on his part. But we do not understand that such specification precludes his right of recovery upon a cause of action set forth in the declaration, and which would be proper matter for a specification, and growing out of the subject-matter of the specification actually filed, if, as in this case, the defendant confesses in open court, and on trial, such cause of action. The purpose of making the specification, is to prevent surprise to the defendant, and to enable him to prepare to meet by evidence or otherwise the specified cause of action. The defendant does not need to be protected in this manner, in respect to a ground of recovery which he is ready to confess and does confess voluntarily on the trial. The case of *Williams v. Allen*, 7 Cow. 316, and the learned note of the reporter, seem fully to sustain this view. *Lapham v. Briggs*, cited by defendant's counsel, is consistent with it, and indeed, none of the cases are adverse to it.

Plaintiff's counsel did not make a point on the exception taken to the refusal of the court to allow him to amend the specification,

so we content ourselves with saying that ordinarily, and especially in this case, such proposal of amendment rests in the discretion of the court, and is not the subject of exception.

Judgment reversed.

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DANIEL WEBSTER v. J. C. ORNE.\*

*Exemption from Attachment.*

G., who was not living with his family, and who worked out by the day, and did some jobs, became the owner of a horse in June, 1867, and on the 29th of the next October, it was attached on his debt. On the 18th of the same October, he procured by assignment a bond for a deed of a small farm, and at the date of the assignment, went into possession thereof, and used the horse thereon in drawing off stumps and stone, and drawing up wood, but had been previous to the attachment, trying to sell the horse, because he had no use for it, and but little hay to keep it on, and at the time of the attachment, was intending to sell it, and buy again in the spring. He also drove the horse a little, and allowed others to drive it on several occasions. He had no other team at the time of the attachment, and had not had that season, and did not afterwards have that year. *Held*, that such use of the horse was evidence tending to show that it was kept and used for team work, and that the finding of that fact by the county court from the evidence, was conclusive.

The statute does not require that horses shall be kept and used exclusively for team work, in order to exempt them from attachment. Statutes exempting property from attachment, are remedial, and should be construed liberally in favor of the debtor.

TROVER for a horse of the value of \$60. Plea, the general issue, and trial by jury, June term, 1868, PECK, J., presiding.

The horse in question was attached by the defendant as constable of Westmore, on the 29th day of October, 1867, on a writ in favor of one Ashley Bishop against one William Gilfillan. On the 31st day of the same month, and while the horse was in the possession of the defendant by virtue of said attachment, Gilfillan sold the same to the plaintiff, and on the same day the plaintiff demanded the horse of the defendant, who refused to deliver it. The question was whether the horse was exempt from attachment under the statute of 1866, exempting two horses, kept and used for team work, and such as the debtor may select in lieu of oxen or steers, from attachment. Gilfillan became the owner of the horse in June, 1867, and hired it pastured that summer, and until

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\* This case was decided at the August term, 1868.



he purchased a farm as hereafter stated. He had a wife, and they had formerly kept house together, but he had not lived with his family since the March previous. He had no regular business that season, but worked out as a laborer for various persons, and, among other things, did a job of clearing land, but it did not appear that he used the horse in or about any of that business. Some of the time he boarded with a Mrs. Champion, who lived on the farm which he purchased, and was boarding there when the horse was attached. He allowed Mrs. Champion and a Mrs. Leland to drive the horse on several occasions, and drove it a little himself, but how much, it did not appear. On the 18th of October, 1867, Gilfillan procured by assignment a bond for a deed of the farm whereon Mrs. Champion resided, which consisted of farm buildings and about thirty acres of land, and on the 27th day of the next November, he conveyed his interest therein to Mrs. Champion. At the time of the assignment of said bond to him, he went into possession of said farm, and carried it on, subject to the right of one Leland to harvest the crops raised thereon that year, which belouged to him, and boarded with Mrs. Champion, till he conveyed to her as aforesaid. After the assignment of the bond, he kept the horse on the farm, and used it thereon in drawing off stumps and stone, and drawing up wood, but it did not appear whether the horse was on the farm at the time of the attachment. He had tried to sell the horse at various times before the attachment, as he had but little hay to keep it on, and no use for it, and was intending to sell it, and buy again in the spring. He had no other horse, and no oxen or steers, or other team, when this attachment was made, and had not had that season, and did not afterwards have that year. From the foregoing facts, the court found that after the assignment of said bond to Gilfillan, he kept and used said horse for team work in such a manner as to exempt it from attachment, and rendered judgment for the plaintiff on that ground ; to which the defendant excepted.

*L. H. Bisbee* and *Geo. N. Dale*, for the defendant.

*A. D. Bates*, for the plaintiff.

The opinion of the court was delivered by

WILSON, J. This is an action of trover for a horse which was, on the 29th of October, 1867, attached by the defendant as the property of William Gilfillan, and the only question in the case is, whether the horse was, at that time, exempt from attachment under the provisions of the statute of 1866. The statute exemption of two horses, in lieu of oxen or steers, applies to the two horses kept and used for team work. The evidence detailed in the bill of exceptions and therein referred to, tends to show that the horse in question was kept and used for the purpose named in the statute. The case states that the court found and decided from the evidence, that after the assignment of the bond to Gilfillan, he kept and used the horse for team work so as to render the horse exempt from attachment at the time he was attached. Where evidence has been given on trial by the court, in the county court, which has a legal tendency to prove a fact in controversy before that court, their decision upon the weight and sufficiency of the evidence is conclusive.

It is said by the defendant's counsel that Gilfillan had but little, if any, team work, and did not need a team; that the horse was seldom used for team work, but was more frequently used for other purposes. In order to exempt such team from attachment, the two horses must be kept and used for team work; but the statute says nothing about the amount of team work the horses shall perform in order to be exempt from attachment, nor does the statute require that the horses kept and used for team work shall be used exclusively for that purpose. It has been repeatedly decided in this state, that the statutes exempting certain property from attachment, are remedial in their character, and ought to receive a liberal construction in favor of the debtor. *Dow v. Smith*, 7 Vt. 465; *Freeman v. Carpenter*, 10 Vt. 433; *Mundell v. Hammond*, 40 Vt. 641. We find no error in the findings of the county court, and the judgment of that court is affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF CALEDONIA,  
AT THE  
AUGUST TERM, 1872.

PRESENT :

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. JAMES BARRETT,  
HON. ASAHEL PECK,  
HON. TIMOTHY P. REDFIELD, } ASSISTANT JUDGES.

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C. B. BARRETT v. RUSSELL & FLINT.

*Partnership.*

When negotiable paper is rightly taken payable to a partnership, any member of the partnership has authority to bind the firm by indorsing it in the firm name to a *bona fide* purchaser for value, in due course of business, even though, as between the partners, such paper was the sole property of the partner indorsing it, and the partners had agreed that no member should indorse paper to make the others liable.

ASSUMPSIT on a bill of exchange for \$1,000, dated May 13, 1869, drawn by Snead on Dean, payable to the order of the defendants sixty days after sight, accepted on the day of date, and indorsed by the defendants to the plaintiff. Plea, the general issue, with notice. Trial by the court, December term, 1871, Ross, J., presiding.

Flint alone defended. The court found that the plaintiff purchased said bill of exchange in the usual course of business, in good faith, for value, before maturity, and that at the time of purchase, he did not know for what it was given, and never knew, except from hearsay. There was no direct evidence to show what the consideration of the bill to the defendants was. At the time of drawing the bill, the defendants were partners as owners and in selling territory for a patent nailless horse-shoe, and in no other business. They operated together in making sales of territory during the season of 1868, and till about the 1st of April, 1869. In these sales, they took notes running to themselves jointly, and other property. These notes and other property they divided about the 1st of April, 1869, and Russell took some horses, belonging to himself, to Boston for sale, and then returned to his residence in Illinois. Massachusetts was sold to parties in February, 1868, and New Hampshire, about the same time in 1869, which was the last sale they made together. When the defendant Russell left for Boston, he had a general power of attorney to sell territory, and to sign Flint's name to the deeds thereof. He had no authority to indorse the company name, except such as was derived from his power to make sales and deeds of territory, and to receive pay therefor. It was understood between the defendants that neither should indorse paper to make the other liable. Flint never received any of the avails of said bill of exchange, nor knew for what it was given. No question about presentment and notice was made. The bill was first purchased of the defendants by one Davis, and indorsed in blank by Russell with the name of Russell & Flint. Davis received it in part payment for a stable which he sold to one Johnson, who took it, as Davis understood, on a debt the defendants owed Johnson for keeping horses. Russell indorsed the bill and delivered it directly to Davis. At the time of the indorsement, the defendants jointly owed Johnson nothing for keeping horses, but whether Russell did or not, did not appear.

The court decided that the presumption was that the bill was given in payment for territory sold by Russell under his power of attorney, and that Russell had authority, implied from his power to sell, deed, and receive pay for territory, to indorse the bill in the

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Barrett v. Flint.

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company name, and rendered judgment against both defendants for the amount of said bill; to which the defendant Flint excepted.

———, for the defendants, cited *Waller v. Keyes*, 6 Vt. 257; *Chitty on Bills*, 48; 2 *Caines*, 246; *Pratt v. Page*, 32 Vt. 13.

*Belden & May*, for the plaintiff, cited *Edw. on Bills*, 96; *Vernon v. Manhattan Co.* 17 Wend. 524; *Parsons Part.* 99, 108; *Gansevoort v. Williams*, 14 Wend. 133; *Story Prom. Notes*, §128; *Doty v. Bates*, 11 Johns. 544; *Swan v. Steele*, 7 East, 210; *Ridley v. Taylor*, 13 East, 175; *Griffith v. Buffum*, 22 Vt. 181; *Parsons Part.* 129.

The opinion of the court was delivered by

BARRETT, J. The defendants were partners when this bill was drawn in their favor and indorsed in their partnership name by one of the firm. The taking of such paper was in the time of the partnership business. Either partner was authorized to take such paper, and for the purpose of making it available, each was authorized to use the partnership name in indorsing it, even if, as between the partners, such paper should become and be the sole property of one of the partners. It being payable to the partnership, of course a legal transfer for commercial purposes would require an indorsement in the name of the payees. The right to make such indorsement by the partner holding such paper, is, as to parties taking such paper *bona fide*, in due course of legitimate transfer, beyond question. The law of the subject as applicable to this case, needs no elaboration at this day. It is amply pronounced, developed, and applied in many cases, and in all the treatises on commercial paper. See those cited by counsel for plaintiff; and there is nothing to the contrary.

Judgment is affirmed.

## GALUSHA J. BUNDY v. HENRY H. MORGAN.

*Ejectment. Construction of Deed.*

A deed described one line of the land thereby conveyed as running "north, 34 degrees west, on said M.'s line and C.'s north line, 45 rods and 16 links, to the bound begun," which was the line in dispute. At the time of the execution of said deed, the land of M.—who was the grantee in said deed—which was contiguous to the land conveyed thereby, and on the line of which the disputed line was described as running, extended northerly only to a brook which intersected said last mentioned line. On the opposite side of the brook, C.'s land was situated, extending several rods further north-easterly along the brook than the point where "said M.'s line" terminated at the brook, so that, if the disputed line should be continued in the same course across the brook to the place of beginning, said deed would include a portion of C.'s land lying south of and adjoining the land of the grantor conveyed by said deed. In order for the line in question to reach and run on C.'s north line, it would, at the point where it reached C.'s land at the brook, have to turn nearly at a right angle, and run north-easterly on his line a few rods, to the corner of his land, then turn at an acute angle, and run on his north line in a course, north, 67½ degrees west. At the time of the execution of said deed, C.'s north line was marked by a log and slash fence on the land, and as nearly on the line as such fences usually are. *Held*, that the monuments and abutments, and not the course, controlled the construction of said deed, and that the land thereby conveyed was bounded along the line in question by the said lands of M. and C.

EJECTMENT for land in Lyndon. Plea, the general issue, and trial by the court, June term, 1872, Ross, J., presiding.

The plaintiff claimed title to the land in question through a deed from Amasa Knapp to Wm. C. Morgan, dated February 15, 1850, in which the land thereby conveyed was described as follows: "Commencing at the south corner of said Knapp's land; thence 23 degrees east, eleven rods, to a stake in the fence; thence south, 34 degrees east, 51 rods and about 7 links, to the road leading by said Morgan's house; thence west, on the west side of said road, ten rods, to said Morgan's line; *thence north, 34 degrees west, on said Morgan's line and Simon Colton's north line, 45 rods and 16 links, to the bound begun.*" On the 26th of September, 1850, the said Colton conveyed the land in question to said Morgan; and the county court found, in addition to the finding stated in the opinion, that at the time of said last named conveyance, the land was surveyed, and said fence treated as the line between Morgan's purchase of Knapp and his purchase of Colton. The defendant was conceded to be in possession of the premises.

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Bundy v. Morgan.

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All the other facts in the case sufficiently appear in the opinion of the court. Judgment for the defendant, and exceptions by the plaintiff.

G. C. & G. W. Cahoon, for the plaintiff.

A deed should be construed according to the intention of the parties, as manifested by the whole instrument. *Mills v. Catlin*, 22 Vt. 98; *Wellington v. Mendough*, 41 Me. 281; and it would seem to be a question of law. *Stevens v. Hollister*, 18 Vt. 294; *Guptill v. Damon*, 42 Me. 271; *Randall v. Thurston*, 43 Me. 226. If the intention of the parties upon the face of the deed be ambiguous, the construction is to be most strong against the grantor. *Mills v. Catlin*, *supra*. The title which Morgan acquired by virtue of his deed from Colton, dated September 26, 1850, enured to the plaintiff. *Ascough v. Johnson*, 2 Vern. 66; *Somes v. Skinner*, 3 Pick. 51; and a tenant who claims the same estate as the grantee of the seller, by a subsequent conveyance of the same, is estopped to say that the seller was not seised. *White v. Patten*, 24 Pick. 324; *Fairbanks v. Williamson*, 7 Greenl. 96.

Dickey & Smith, for the defendant.

In conveyances of real estate the law is settled, that acknowledged and well defined boundaries and monuments govern courses and distances. *Gilman v. Smith*, 12 Vt. 150; *Clark v. Tabor*, 28 Vt. 222; *Patch v. Keeler et als.* Ib. 332; *Jakeway v. Barrett*, 38 Vt. 316; *Park v. Pratt*, Ib. 552; *Russell v. Maloney*, 39 Vt. 579; *Powers et al. v. Silsby et al.* 41 Vt. 288; 3 Washb. Real Prop. 348, *et seq.*

The opinion of the court was delivered by

PECK, J. The only question made in the case is in reference to the construction of the deed, Amasa Knapp to Wm. C. Morgan, dated February 15, 1850, as to the location of the last line described in that deed, and through which the plaintiff claims title to the land in dispute. The solution of the question must depend on the language of the deed, in connection with such facts found by the county court as may legally be resorted to in aid of the in-

terpretation of it. The line in question is described as running "north, 34 degrees west, on said Morgan's line and Simon Colton's north line, 45 rods and 16 links, to the bound begun." The case shows that the county court found as matter of fact, that at the time of the execution of this deed, Simon Colton owned and occupied the premises in dispute, and that his north line was where the defendant claims his north line now is, and that it was marked by a log and slash fence then upon the land, and as nearly on the line as such fences usually are; and that if the course of this line as mentioned in the deed, is to be continued beyond the brook, and to control in preference to the occupation and fence as existing at the time of the execution of the deed, then the land in controversy belongs to the plaintiff. The county court held otherwise, and decided that the fence beyond the brook, and the known and recognized monuments on the land and line as recognized when this deed of Knapp to Wm. C. Morgan was executed, would control the line beyond the brook, and that the course mentioned in the deed should be extended only to the brook which crossed this line; and rendered judgment for the defendant. The statement of the case in the bill of exceptions, is not sufficiently full to present the precise question involved, without the aid of the plans in the case, and they are too meager to supply all the necessary facts; but by the explanations and concessions of counsel, we have been able to arrive at the point in the case.

It appears that the land of Wm. C. Morgan, which was contiguous to the land conveyed to him by Knapp by the deed in question, and on the line of which this disputed line is described as running, extended only to the brook. On the opposite side of the brook the land was situated which was owned and occupied by Simon Colton at the time of the execution of the deed in question from Knapp to Morgan, and extending several rods further north-eastwardly along the brook, than the point where "said Morgan's line" terminated at the brook. Therefore, if the line in question in Knapp's deed to Morgan, be continued in the same course north, 34 degrees west, across the brook, to the place of beginning, the deed would include a portion of the land which, at the date of that deed, was owned and occupied by Simon Colton, lying south



of and adjoining Knapp's land which by that deed he conveyed to Morgan that side of the brook. The line in dispute has two descriptions in the deed; one, its course north, 84 degrees west, and the other, "on said Morgan's line and Simon Colton's north line." It does not appear but that either description would reach the bound begun at. It is to be inferred from the exceptions that there is no discrepancy between the two descriptions along to the brook the distance of "said Morgan's line;" but beyond that, the two descriptions do not agree; and one or the other must be regarded as the false description, and the other adopted as the true one. As between courses and distances on the one side, and abutments and monuments on the other, in case of disagreement, abutments and monuments, when identified, must, as a general rule, control. If, as the exceptions would indicate, aside from the plans in the case, no other departure from the course of the line mentioned in the deed was necessary than a single change of its course at the end of the Morgan line at the brook, in order to follow Simon Colton's north line direct to the place of beginning, it would be but the common case for the application of this rule, although that line, beyond the brook, runs north  $67\frac{1}{2}$  degrees west, instead of north 84 degrees west, as named in the deed. But it appears on reference to the plans in the case, that in order for the line in question to reach and run on Simon Colton's north line, it must, at the point where it reaches his land at the brook, turn at nearly a right angle and run in a north-eastward direction on his, Simon Colton's, line, some few rods (the exact distance is not given), to the corner of his land, and then turn at a still greater angle to run on his north line, on a course north  $67\frac{1}{2}$  degrees west. This feature of the case renders the construction of the deed more doubtful. But if the course of the line as indicated by the point of compass named in the deed, is allowed to govern, the deed includes the very land which the deed refers to as bounding the land therein conveyed. If the monuments and abutments control the construction, the land conveyed is bounded along the line in question by the land of Morgan as far as Morgan's land extends, and the residue of the way to the place of beginning, by the land then owned and occupied by Simon Colton; and, on

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 Chamberlin v. Donahue.
 

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the whole, we think this is the legal intendment of the deed, and the one most likely to harmonize with the intention of the parties.

It is not claimed by plaintiff's counsel, that Knapp owned the land in dispute at the time he executed the deed to Wm. C. Morgan; but it seems to be conceded by counsel, that Wm. C. Morgan's mortgage to Bronson, of even date with Knapp's deed to Wm. C. Morgan, conveyed the same land which Knapp's deed conveyed to Wm. C. Morgan, and by the same description; and that the plaintiff, by assignment from Bronson, has the title conveyed by that mortgage. The plaintiff then claims that when Simon Colton, by his deed of Sept. 26, 1850, conveyed the premises in dispute to Wm. C. Morgan, the title thus acquired enured to the benefit of the plaintiff. However this might be if Knapp's deed to Wm. C. Morgan, and Wm. C. Morgan's mortgage to Bronson, had embraced the land in dispute, it not being embraced in that deed, the plaintiff takes no benefit by Colton's deed to Morgan.

We have not been furnished with all the papers referred to in the exceptions; and the plaintiff's counsel has urged some other grounds of claim which we have not considered, because based rather on what is assumed to have appeared at the trial below, than upon what legitimately is before this court.

Judgment affirmed.

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SARAH CHAMBERLIN v. MICHAEL DONAHUE.

[SEE 41 VT. 306.]

*Ejectment. Landlord and tenant. Notice to quit. Tenancy from year to year. Determination of tenancy at will, or at sufferance.*

Notice to quit is never necessary, unless the relation of landlord and tenant exists.

If one in possession repudiates the relation of tenant to his landlord, demand of possession or notice to quit, is not necessary.

An agreement to pay rent by the tenant, is an essential element of a tenancy from year to year.

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Chamberlin v. Donahue.

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A tenancy at will may always be determined by any act or declaration inconsistent with the continued voluntary relation of landlord and tenant.

Whether one be in possession of land under an implied license, or as tenant at sufferance, or at will, the commencement of an action of ejectment against him by the owner, determines his relation, and his possession thereafter becomes wrongful.

EJECTMENT for certain premises in Peacham. Plea, the general issue, and trial by the court, December term, 1871, Ross, J., presiding.

Guy Chamberlin, husband of the plaintiff, who died about 1858, owned the demanded premises, and occupied them at the time of his decease as a homestead, at which time they were not worth over \$500. He left no minor children, but left two daughters; one, married and residing away from home; the other, unmarried and residing at home. No administration was ever granted upon his estate, and said premises were never conveyed after his decease. The unmarried daughter continued to reside upon said premises with the plaintiff, her mother, without any contract or agreement whatever, until she married the defendant, May 8, 1863. At that time, the plaintiff had gone to her other daughter's, in Bradford, leaving this daughter at home occupying the premises, but under no contract for the payment of rent, or other contract, express or implied. The plaintiff returned home the following November, and remained about a year with the defendant and his wife, occupying such part of the premises as she chose. At the time of his marriage, the defendant went into the occupancy and possession of said premises, and continued therein without any claim, and without any contract or understanding with the plaintiff, in relation thereto. About a year after the plaintiff returned home, she sent her brother and her attorney to the defendant, to make some arrangement with him to purchase, rent, or quit, the premises; but he refused to make any arrangement whatever. There never was any understanding, contract, or expectation that the defendant's wife before marriage, or the defendant after marriage, should pay rent; but the plaintiff permitted her daughter before marriage to remain and occupy the premises with her; and the defendant never claimed to occupy except as his wife had, and in her right.

The plaintiff commenced two actions of ejectment against the defendant; one, May 18, 1867, and the other at the December term, 1868; and an action to recover rent, tried at the June term, 1870; all of which failed on technical grounds. On the first day of November, 1869, and before the commencement of this suit, the plaintiff's attorney, J. P. Lamson, Esq., wrote the defendant to quit the premises by the 15th of May then next, and deposited the letter in the post-office, but the defendant never received it.

On the 9th of May, 1870, the plaintiff caused written notice to be served on the defendant to quit on the 15th of November then next. The defendant was in the occupancy and possession of the premises from the time of his marriage to the time of trial; and the yearly rental value thereof was \$45.

The defendant claimed that the foregoing facts created a tenancy from year to year, which could only be terminated by six months' notice to quit at the end of the year, May 8; and that, no such notice having been given, judgment should be for the defendant. But the court held otherwise, and decided that there never was any tenancy of any kind between the parties, but only an implied license from the plaintiff to her daughter before her marriage, to occupy, and that the defendant went in under the same license, and continued to occupy thereunder until the first suit in ejectment was brought, which operated as a revocation of said license, and that it then became the duty of the defendant to quit the premises within a reasonable time, and that, considering that the defendant had crops in the ground, such reasonable time expired November 1, 1867; and rendered judgment for the plaintiff to recover the seisin and possession of said premises, and damages at the rate of \$45 per year from November 18, 1867, to the time of trial. Exceptions by the defendant.

*Bliss N. Davis*, for the defendant.

The defendant's wife occupied as tenant at will. 1 Washb. Real Prop. 375, § 24; *Cheever v. Pearson, et al.* 16 Pick. 266; *Doe d. Nicholl et als. v. M'Keag*, 10 B. & C. 721; *Doe v. Wood*, 14 M. & W. 682; *Hanchett v. Whitney*, 2 Aik. 240, and 1

Vt. 311. In a tenancy at will, notice to quit is necessary. 1 Washb. Real Prop. 379, § 35. But a tenancy at will becomes a tenancy from year to year. Ib. 379, § 37; Smith Land. & Ten. 234; *Hanchett v. Whitney*, *supra*.

The court held that there never was any tenancy of any kind. The law determines the relation of the parties, from the facts. An implied license has the same effect as an express license, and an express license can be nothing less than a tenancy at will, and becomes a tenancy from year to year. 1 Washb. Real Prop. 394, § 5. The court must have found that there was a tenancy of some kind, by holding that the commencement of the first ejectment suit, was notice to quit, which the defendant should have respected. This holding was the necessary consequence of the determination of that case, reported in 41 Vt. 306. Service of a writ of ejectment, is notice to the defendant therein that he is regarded as a disseisor; but, that the service makes him such, is a novel idea in law. If the commencement of that suit operated as notice to quit, it was ineffectual, because it notified him to quit at no particular time. The law says that the landlord must fix the time to quit. But, if the commencement of that suit was notice to quit, or made the defendant a disseisor after the lapse of a reasonable time, the plaintiff waived such notice by commencing her action for rent, wherein she declared that the defendant was her tenant from May 8, 1864, to February, 1870, when that suit was commenced. *Goodright d. Charter v. Cordwent*, 6 T. R. 219; 1 Washb. Real Prop. 385, § 311; *Zouch d. Ward v. Willingall*, 1 H. Bl. 311. Giving new notice to quit, was a waiver of the first notice. *Doe d. Brierly v. Palmer*, 16 East, 53.

• *J. P. Lamson*, for the plaintiff.

The case negates everything necessary to constitute a tenancy from year to year. The court found that there never was any contract between the plaintiff and her daughter, or between the plaintiff and the defendant, in relation to the occupancy of the premises. The strongest relation between the parties was, that the defendant occupied under an implied license from the plaintiff,

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which she could revoke at any time. If the commencement of the first suit in ejectment, was not a revocation of such license, the notice to quit of May 9, 1870, was, and it became the duty of the defendant to quit at the time therein named, which was fully six months from the time notice was given.

The opinion of the court was delivered by

REDFIELD, J. This suit was ejectment to recover possession of plaintiff's homestead in Peacham.

The plaintiff resided on her homestead with an unmarried daughter, and while she was temporarily absent at Bradford, on a visit to her married daughter, the defendant intermarried with the maiden daughter, on the 8th of May, 1863. The plaintiff returned to her home in November, 1863, and occupied the house about a year, the defendant living in the house with the daughter. The daughter, up to the time of her marriage, lived with the plaintiff as a child and member of her family, without any contract or understanding as to her relation with the plaintiff; and after her marriage, the same relation continued as to herself and husband. After living so together for about a year, the plaintiff requested her attorney to make an arrangement with the defendant, either to buy, rent, or quit, the premises. He declined to make any arrangement.

The plaintiff then brought two successive suits in ejectment, and one in assumpsit for rent; all of which failed on technical grounds. Before commencing this suit, the plaintiff, on the 9th of May, 1870, caused notice to be served on the defendant to quit the premises on the 15th of November following. The court find from the evidence, that the defendant was not *tenant* of the plaintiff, but that he had simply lived in her family, and on the premises, as the daughter had before her marriage. The relation between the parties—whether the defendant was in possession of the plaintiff's premises as *tenant*, or otherwise—was a fact, and when found, is conclusive. But it is claimed by the defendant that the special facts found by the court, show that the defendant was tenant at will, and that this relation had been so continual that it had grown into a tenancy from year to year.

When plaintiff's brother and her attorney, Mr. Hale, undertook, in her behalf, to make some arrangement with defendant, he expressly refused to lease or vacate the premises. "No notice to quit is ever necessary, unless the relation of landlord and tenant subsists. If one in possession repudiates the relation of tenant to his landlord, no demand of possession or notice to quit is necessary." 1 Washb. Real Prop. 394, § 42. "An agreement to pay rent on the part of the tenant, is regarded as an essential element of a tenancy from year to year." *Ib.* 396, § 3. There would seem no ground or reason for claiming that the defendant was in possession as tenant from year to year. And at the time he refused to vacate the premises or pay rent, he was liable to ejectment without further demand or notice. But he was suffered to remain in possession after he had thus defied the owner for some two years, until the commencement of the first suit in ejectment in May, 1867; and it is claimed that he should be regarded as entitled to the privileges of a tenant at will, although, without right, he held possession *against* the will of the owner. But a tenancy at will may always be determined by any act or declaration inconsistent with the continued voluntary relation of landlord and tenant: the assertion of title to the possession of the land; "threatening to take legal means to recover the premises, determines the will." 1 Washb. Real Prop. 384-5, §§ 8, 9, 10. "A demand of possession, without notice to quit, is a sufficient determination of the will." *Doe d. Roby v. Maisey*, 8 B. & C. 767. *Doe d. Price v. Price*, 9 Bing. 356. In the latter case, the defendant (a brother of the plaintiff) had been let into possession, without any agreement, and had continued to occupy and crop the land for fifteen years. The plaintiff, by his attorney, wrote a letter to the defendant in these words: "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property." It was held a tenancy at will, and that the notice determined the will. Ch. J. TINDAL says, in giving judgment: "Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will." This defendant had not been quietly in possession for fifteen

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years, as in *Doe v. Price*; but less than half that term. The plaintiff had not only *threatened* legal measures to obtain the possession, but had been constantly *using* the process and machinery of the law to obtain the possession of her property; and, thus far, baffled by the defiant insolence of the defendant and the subtlety of his counsel. The defendant, if tenant at will, would be entitled to the emblements, if he had any; but in this case, he had six months' notice, and more than he could legally claim.

But, we think that, whether the defendant was in possession by his "implied license," or as tenant at sufferance, or at will, the relation was determined by the suit in ejectment instituted in May, 1867; and that, after that, he withheld the possession from the plaintiff wrongfully. The court allowed him to enjoy the emblements without paying rent, until the 18th of November following, which is a leniency, even to the utmost limits allowed by the "common law of England," which the defendant so stoutly invokes.

The judgment of the county court is therefore affirmed.

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### WILLIAM DAVIS v. DANIEL GOODRICH.

#### *Parol evidence to vary written agreements.*

The rule as to the admissibility of parol evidence to vary written agreements does not touch the validity of the agreement sought to be proved, but only the kind of evidence by which the party may be compelled to prove it; and if the agreement is admitted on trial, or by the pleadings, or is proved without objection, by parol evidence, it is a waiver of the rule, and becomes the agreement, as fully operative as if it had been proved by a writing.

**ASSUMPSIT** to recover the amount of a draft. Plea, the general issue, and trial by jury, June term, 1872, Ross, J., presiding.

Said draft was drawn on the 5th of November, 1870, by one Lynde, on the Howard National Bank of Boston, in favor of the defendant, and by him endorsed to the plaintiff about the 10th of the same November, and by the plaintiff indorsed to one Damon,



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and was presented and protested for non-payment, February 6, 1871, and taken up by the plaintiff as indorser. In 1870, the plaintiff was a merchant at Hardwick, and the defendant was a farmer and cattle-drover, residing in the same town. Lynde was a butcher in the vicinity of Boston, and was well known to the defendant, but unknown to the plaintiff. The draft was sent to the defendant, at Hardwick, in payment of cattle purchased of him by Lynde, and the defendant, upon its receipt, indorsed the same to the plaintiff, and received the face of it in money. The plaintiff, without objection, gave evidence tending to show that when the defendant asked him for the money on the draft, he told him he did not know the drawer, and could not then use the draft, as he had no bills in Boston, but that he could accommodate him with the money if he would allow him to hold the draft without presentment for payment, until he had bills to pay in Boston; that the defendant thereupon indorsed the draft and received the money on it, and agreed that he might keep it till he had bills due in Boston; that the plaintiff forwarded the draft in payment of the first bills he had fall due in Boston, at the time they fell due, and that the same came back protested.

The defendant's testimony tended to show that he only agreed that the plaintiff might hold the draft two or three weeks, at the longest, and that before he left the store, after having received the money, he requested the plaintiff not to wait that length of time, but to send it forward at once. The plaintiff denied this request. The defendant's testimony further tended to show, that Lynde failed, or stopped payment, and withdrew his funds from said bank, on the 24th of January, 1871, and that he had funds there to pay said draft till that day. After the testimony was closed and the arguments commenced, the defendant requested the court to charge the jury that "the plaintiff cannot change the legal duty of immediate presentment under the law-merchant, by parol testimony, and that the indorsement of the draft by the defendant governs the contract." The court refused to charge as requested, but submitted the case to the jury upon the evidence which had been received without objection, with instructions not excepted to. To the refusal to charge as requested, the defendant excepted.

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*B. N. Davis*, for the defendant.

It is the duty of the court to charge correctly and fully upon every point material to the decision of the case, upon which there is testimony, whether requested or not. *Vaughn v. Porter*, 16 Vt. 266. In this case the request was on the opening argument for the defendant. In *Stanton v. Banister*, 2 Vt. 464, the levy of an execution on real estate was read to the jury without objection, but the court held that its invalidity might be urged in argument, and the court requested to instruct the jury upon the subject. *Wait v. Maxwell*, 5 Pick. 220.

The important question in the case is, whether parol evidence can be received to vary the contract of indorsement. So far as the contract is expressed in writing, the plaintiff was to observe the condition of immediately sending the draft forward and make a demand of payment. Story Prom. Notes, § 147. It was competent for the parties to contract to waive presentment indefinitely; but such enlarged liability being part of the contract, and not reduced to writing, cannot be supplied by parol. *Hoar v. Graham*, 3 Conn. 57; Chit. Bills, 466.

*L. D. Hathaway*, for the plaintiff.

The defendant did not seasonably object to the testimony. The defendant's request amounted to asking the court to rule out the parol testimony after it had been introduced by both sides without objection. The court rightly refused to charge as requested. *Williams v. Haywood*, 41 Vt. 279; *Laurent v. Vaughn*, 30 Vt. 90; *Hills v. Marlboro*, 40 Vt. 648; *Wakefield v. Fairman et al.* 41 Vt. 339.

If the testimony had been seasonably objected to, it would have been admissible for the purpose of showing the contract the parties made, for the reason that they were both parties to the draft. *Pitkin v. Flanagan*, 23 Vt. 160; *Sandford v. Norton*, 14 Vt. 228; *Strong v. Riker*, 16 Vt. 554; *Sylvester v. Downer*, 20 Vt. 355; *Barrows v. Lane et al.* 5 Vt. 161; *Miner v. Robinson*, 1 D. Chip. 392; *Marsh v. Babcock*, 2 D. Chip. 124; *Lathrop v. Wilson*, 30 Vt. 604; *Adams v. Flanagan*, 36 Vt. 400. It is in the power of parties to waive the rule that parol evidence is not

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admissible to vary a written contract, and when waived, the evidence is admissible like any other proper evidence; and when a party does not object to the introduction of such evidence to vary or explain written contracts, he is understood to waive the rule. *Hills v. Marlboro*, *supra*; *Carpenter v. McClure*, 37 Vt. 127. Parol evidence was admissible to show what the contract was, and also to show what was in the contract, which does not vary or contradict the indorsement. *Winn v. Chamberlin*, 32 Vt. 318; *White v. Miller*, 22 Vt. 380; *Harwood v. Harwood*, *Ib.* 507; *Holmes v. Crossett*, 33 Vt. 116; *Hayward Rubber Co. v. Dunclee*, 30 Vt. 29; *Hopkins v. School District No. 3 in Danby*, 27 Vt. 281; *Linsley v. Lovely*, 26 Vt. 123; *Lowry et al. v. Adams*, 22 Vt. 160. No time was specified in the indorsement when the draft was to be presented, hence the plaintiff was entitled to a reasonable time, under the circumstances of the case, to make presentment. Story Prom. Notes, (5th ed.) 650, 659, 661. The parol evidence was no contradiction of the indorsement; and it is evident that the parties did not intend to reduce the whole contract to writing; hence parol evidence was admissible to prove what the contract was. *Winn v. Chamberlin*, *supra*.

The opinion of the court was delivered by

BARRETT, J. It is unquestionably true that as between plaintiff and defendant, if the alleged agreement as to the time of presenting the draft for payment had been in writing, as it was a part of the transaction of purchase by the plaintiff, it might be proved by the writing, and would be effectual in behalf of the plaintiff. The rule as to parol evidence which the defendant insists on in this case, does not touch the validity of the agreement, but only the kind of evidence by which the party may be compelled to prove the agreement. If the agreement is admitted on the trial, or by the pleadings, or it is proved without objection by parol evidence, it is a waiver of the rule, and leaves the agreement as fully operative as if it had been proved by a writing. See *Noyes v. Evans*, 6 Vt. 628; 37 Vt. 127, *Carpenter v. McClure*.

Judgment affirmed.

JOHN C. DOW v. JOHN K. BATCHELDER AND TRUSTEE, AND  
WILLIAM LANGMAID, CLAIMANT.

*Effect of appeal in trustee cases. Discontinuance by death of the  
defendant.*

In trustee suits, commenced before a justice of the peace, an appeal, whether by one of the principal parties, or only by the trustee or claimant, brings the whole case into the county court as to all the parties.

A trustee suit commenced before a justice of the peace, wherein judgment was rendered against the principal defendant and trustee, was appealed by the claimant only, and continued at the first term, without an affirmance of judgment against the principal defendant. The principal defendant died before the next term, and administration was granted upon his estate, and commissioners appointed. *Held*, that the suit was discontinued by the death of the defendant.

BOOK ACCOUNT, originally commenced before a justice of the peace. Judgment against the principal defendant and trustee, and appeal by the claimant only. The appeal was entered at the December term, 1871, and the cause continued to the next term, without an affirmance of the judgment against the principal defendant. The principal defendant deceased before the next term; and at that term, on motion of the claimant, and upon proof of the grant of administration and the appointment of commissioners on the estate of the defendant, the court, Ross, J., presiding, ordered the suit discontinued by death of the defendant. Exceptions by the plaintiff.

*Bliss N. Davis*, for the plaintiff.

*Burkes*, for the claimant.

The opinion of the court was delivered by

PECK, J. In a trustee suit commenced before a justice of the peace, an appeal, whether by one of the principal parties, or only by the trustee or claimant, brings the whole case into the county court as to all the parties. Where the appeal is by either of the principal parties, and no appeal by the trustee or claimant, the case is open for trial in the county court, not only as between the

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plaintiff and defendant, but also as to the trustee and claimant. Even where the plaintiff only appeals, and in his appeal claims to limit his appeal to the decision of the justice as to the liability of the trustee, the defendant is not bound by the judgment of the justice against him, but is entitled to a trial in the county court, and to have the whole case treated as open. *Bryant v. Pember & Tr.* 43 Vt. 599.

Where the appeal is only by the trustee or claimant, the statute provides that the judgment of the justice against the defendant shall be affirmed by the county court without costs. This provision of the statute shows that in such appeal the whole case is brought up, and that in order to hold the trustee chargeable and have a judgment against him, there must be a judgment rendered by the county court against the principal defendant. No judgment can be rendered against a party who has deceased pending the suit. In such case, the party deceased is no longer in court, or a party in the action; and even if the cause of action is such as survives, still, no judgment can be rendered after the decease of the defendant, till the executor or administrator of the deceased party appears in the cause to represent him, or until such executor or administrator has been by order of court duly cited to appear, and has made default. But whether the executor or administrator has been cited in or not, if commissioners have been appointed on the estate of the deceased defendant, the suit, by the express provision of the statute, must be discontinued and the case go before the commissioners. The few exceptions in the statute, of certain forms of action that cannot be tried by the commissioners, have no application to the case at bar. It is claimed by plaintiff's counsel that the affirmance of the judgment against the principal defendant, in cases like the present, is but matter of form, and that the statute referred to requiring the discontinuance of cases by death, does not apply to such appeals. *Shelden v. Shelden & Trustee, & Claimant*, 37 Vt. 153, was an action of general assumpsit for the recovery of a promissory note only, executed by the defendant to the plaintiff (although no specification had been filed), in which suit a trustee was summoned at the first term of the county court; a default was entered against

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the defendant, a claimant entered, and a commissioner was appointed as provided by statute, to take disclosure of trustee and report as to his liability. A hearing was had before the commissioner, and afterwards, and before the next term of the court, the defendant died, and commissioners were appointed on his estate. It was decided that the plaintiff could not proceed further in the suit, and that the county court, on motion of the claimant, properly ordered the suit discontinued by death of defendant. It is true, a default, as in the case referred to, does not cut the defendant off from a right to a hearing in damages; while in the case at bar, but for the death of the defendant, *prima facie*, the judgment should have been affirmed against the defendant. But in such cases, something may transpire between the date of the justice judgment and the term of the court at which the plaintiff claims an affirmance of the judgment, that would bar him of the right to an affirmance of the judgment. In the intervening time the defendant may pay the judgment agreeably to the statute, or some other defense may accrue, of which the defendant might avail himself. It would therefore be hazardous to render judgment against a defendant after his decease, with no representative of the deceased in court. Such judgment would be erroneous, and liable to be reversed at common law, on writ of error for error of fact. The fact that no judgment in this case could be legally rendered without the representative of the defendant being made a party, shows that the suit was pending at the death of the defendant, within the meaning of the statute requiring pending suits to be discontinued by death of defendant and appointment of commissioners. The case differs from a case pending in the supreme court on exceptions to the decision of the county court, at the time of the death of a party; because exceptions are in the nature of a writ of error, and do not vacate the judgment of the court below, and may be heard after the administrator or executor has been cited in.

Judgment affirmed.

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Edwards v. Harrington.

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## I. F. EDWARDS v. JOEL HARRINGTON.\*

*Notice of Special Matter under the General Issue. Construction of Submission to Arbitration. Impeachment of Award.*

The notice of special matter alleged a submission to arbitration of the matter in controversy in this suit, after the commencement thereof, and the publication of an award, but only alleged that the award "was to the effect that the defendant was not liable to pay to the plaintiff any damage for the injury complained of." *Held*, that the notice was sufficient upon its face, and, the award not being shown to the court, it must be presumed that the award produced in evidence was in substance the same as the one described in the notice.

The submission provided that "the costs in the county court shall follow the decision of the arbitrators, and shall follow the judgment of said arbitrators *to be made as in a court of law.*" *Held*, that this provision related only to the costs in county court, and had no reference to any rule of decision upon the merits, that the arbitrators were to follow.

But treating it as a provision that the arbitrators should decide according to law, *substantive*, whether the award could be impeached at law for this cause, as it was regular on its face, and no pretense that the arbitrators exceeded their powers, or omitted to decide any matters submitted, and the award purporting to have been made in accordance with the submission.

THIS was an action of trespass *qua. clau.* Plea, the general issue, and notice. Trial by jury, December term, 1867, STEELE, J., presiding.

The notice alleged a submission to arbitration of the matter in controversy in this suit, after the commencement thereof, and the publication of an award, but did not set out the award, or in terms profess to state the substance thereof, but only alleged that the award "was to the effect that the defendant was not liable to pay to the plaintiff any damages for the injury complained of by said plaintiff." On trial the plaintiff objected to the introduction of any evidence under the notice, because it set forth only the effect of the award. The court overruled the objection; to which the plaintiff excepted.

The defendant, under the notice, then introduced in evidence a written submission of this suit, and the matters covered by the declaration, to arbitrators, and proved an award which purported to have been made in accordance with the submission. The sub-

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\* This case was decided at the August term, 1868.

mission contained a clause that "the costs in county court shall follow the decision of the arbitrators, and shall follow the judgment of said arbitrators *to be made as in a court of law.*" The plaintiff claimed that this clause bound the arbitrators to decide the case as a court of law, and introduced evidence tending to show that the arbitrators did not profess to be governed by the rules of law, but made their award with reference to what they viewed as the equity of the case. The plaintiff also proved that he claimed the same construction of the submission at the hearing before the arbitrators. The award not being otherwise objected to, the court held it valid, and, no other question of fact remaining, directed a verdict for the defendant; to which the plaintiff excepted.

*B. N. Davis*, for the plaintiff.

*O. S. Burke*, for the defendant.

The opinion of the court was delivered by

PECK, J. The counsel for the plaintiff is correct in his proposition that the statute allowing special matter to be given in evidence under the general issue and notice, only dispenses with the form of a special plea, but not with the substance. It is not claimed that there was any variance between the award given in evidence and that described in the notice. The only objection alleged against the notice is that it does not set forth the award in terms or the substance of it, but only its effect. The award is not made a part of the case and has not been shown us, so that we have no means of determining whether this objection is well founded in fact. For aught we can tell, the award was in the very words of the notice. If so, the plaintiff's objection has no foundation in fact. All we can do is to look at the notice and see whether it is bad on the face of it. The notice, after setting forth the submission, &c., in stating the award, says the parties met before said arbitrators and had a hearing concerning the matter in controversy in said suit, and after the said hearing, in the same month, the said Isaac Patterson and J. F. Stevens made and pub-



lished their award, "*which was to the effect* that the defendant was not liable to pay to the plaintiff any damage for the injury complained of by said plaintiff." The objection made to this notice is that it does not profess to state the words of the award, nor its substance, but only its effect. But, under this notice, the defendant would be bound to prove an award in substance as alleged. This proof must be precisely the same as if in the notice the words, *in substance*, had been inserted in place of the words, "*to the effect*." This being so, it must be assumed that the award produced in evidence was, in substance, the same as that described in the notice, and therefore the notice is not obnoxious to the objection urged against it. *To the effect*, means, *in legal effect*; and in civil suits, and often in criminal cases, it is sufficient to plead a written instrument according to its legal effect.

The other objection to the ruling of the county court, that relating to the arbitrators not professing to decide according to law, in the first place involves a question of construction of the submission. The question of construction is as to the paragraph, "and the costs in the county court shall follow the decision of the arbitrators, and shall follow the judgment of said arbitrators to be made as in a court of law." The subject-matter of the submission was this suit, which was pending at the time of the submission. The object of adding the provision above recited, obviously, was to provide explicitly a guide for the arbitrators as to the costs in the county court. It is the costs in the county court that *shall follow the judgment of said arbitrators to be made as in a court of law*. If the words *to be made* had been omitted, there could be no doubt that the whole force of that provision would relate to the costs in the county court, and have no reference to any rule of decision upon the merits, that the arbitrators were to follow. We think, notwithstanding those words create some doubt as to the meaning, that nothing more was intended than that whatever decision the arbitrators shall make, the costs in the county court shall follow that judgment the same as in a court of law, the same as costs follow the event of a suit in a court of law. If this is the true construction of the submission, this objection to the award must fail, as it does not appear but that as to the costs of

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the county court, the arbitrators professed to, and did, follow the submission. But treating that as a provision that the arbitrators should decide according to law, it is very doubtful whether the award could be impeached at law for this cause, as it was regular on the face of it, and no pretence that the arbitrators exceeded their powers by deciding upon matters not submitted, nor that they omitted in their decision any matter submitted; and as the exceptions show that the award "*purported to have been made in accordance with the said submission.*" None of the cases cited by plaintiff's counsel goes to that extent. But if it could be thus impeached, it would seem that it ought not to be set aside as void, unless it appears that the arbitrators did not decide according to law, or *as in a court of law*. The fact that the plaintiff introduced evidence "tending to show that the arbitrators did not profess to be governed by the rules of law, but made their award with reference to what they viewed as the equity of the case," is not very satisfactory evidence that they decided contrary to law, and would hardly warrant such conclusion. Equity and justice generally turn out to be law, though not always.

Judgment affirmed.

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DAVID C. HUDSON v. WILLIAM F. NUTE.

*Conversion. Offset.*

The defendant delivered his stage horses to the plaintiff to be kept at an agreed price. There was no promise on the part of the plaintiff, express or implied, to re-deliver said horses to the defendant on demand, other than what might be implied from his agreement to keep them as aforesaid; but the defendant had a right to take them at any and all times, to use in his business, and had always done so until the plaintiff refused to permit him to do so, and detained them from him. *Held*, that such refusal and detention was a tort, and a conversion of the horses, and not the proper subject of a plea in offset.

GENERAL ASSUMPSIT to recover for the keeping of defendant's stage horses. Pleas, the general issue, and offset. Trial by the court on an agreed statement of facts, June term, 1872, Ross, J., presiding.

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The defendant pleaded in offset that he delivered his four stage horses to the plaintiff, to be kept at hay and grain, at and for a certain price agreed upon between them, and that the plaintiff was to re-deliver said horses to the defendant on request, and the defendant was to have the right to take said horses, or any of them, at any and all times, to use in and about his business of carrying the U. S. mail and passengers from Lyndon to Island Pond, or any other the business of the defendant; and averred that the plaintiff, on request, refused to re-deliver said horses to the defendant, or to permit the defendant to take them, or any of them, for the purpose aforesaid, but detained them from the defendant for the space of five weeks, to the damage of the defendant two hundred dollars. There was no promise on the part of the plaintiff, express or implied, to re-deliver said horses to the defendant, other than might be inferred from his agreement to keep them for the defendant, and the defendant had the right to take them at any and all times, and had done so until the time of the refusal set forth in said plea. The sole question in the case was as to the validity of said plea in offset. The court decided that the subject-matter of said plea could not be pleaded in offset, and rendered judgment for the plaintiff. Exceptions by the defendant.

*Geo. C. & Geo. W. Cahoon*, for the defendant, insisted that the plaintiff's refusal to re-deliver said horses on demand, was a breach of an implied contract on his part, and hence the proper subject of a plea in offset.

*Belden & May*, for the plaintiff, argued that such refusal was a conversion of the horses, for which trover was the proper remedy, and cited *Kidney v. Persons*, 41 Vt. 386; and insisted that the same could not be allowed in offset, and cited *Keyes v. Western Vt. Slate Co.* 34 Vt. 81, and *Thompson v. Congdon*, 43 Vt. 396.

The opinion of the court was delivered by

REDFIELD, J. This action is assumpsit for the keep of defendant's stage horses; and upon the agreed statement of the case,

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the question is raised whether the defendant's special pleas in offset may be, legally, predicated upon the facts stated. The offset counts upon the refusal of the plaintiff to deliver defendant's horses on demand. The plaintiff having the possession at the time of demand, the refusal to deliver was a *conversion*. The agreement was "to keep defendant's horses." The withholding the possession from defendant was as much a tort as if he had sold or maliciously killed the horses. Our statute of offsets has been extended to unliquidated damages, *Hubbard v. Fisher*, 25 Vt. 539; *Keyes v. Western Vt. Slate Co.* 34 Vt. 81, which was not the case under the English statute. But it has not yet been extended to *torts*. In the case of *Thompson v. Congdon*, 43 Vt. 396, the court allowed the defendant to offset the *use* of a hired carriage, including the injury from *hard usage*, on the ground that there was an implied undertaking to use the carriage with due care and prudence. But the court has uniformly refused to blend, and make concurrent, actions of assumpsit and tort. *Stearns v. Dillingham*, 22 Vt. 624; *Kidney v. Persons*, 41 Vt. 386.

The judgment of the county court is affirmed.

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 GEORGE IDE v. J. B. FASSETT.

*Officer. Receiptor. Demand and Refusal. Attachment.*

It has been long settled in this state that an officer is not liable for property attached by him on *meine* process, which has perished without fault for which he is liable. It is equally well settled that a receiptor of such property is not liable on his receipt, when it has perished without like fault.

On the occasion of a demand by the plaintiff, an attaching officer, of property receipted by the defendant, it was agreed that the defendant should deliver the property to the plaintiff at a time and place of sale to be appointed by the plaintiff. The plaintiff did not make such appointment, but, without making any further demand, sued the defendant on his receipt. *Held*, that he could not recover.

The plaintiff attached ten swarms of bees, and the defendant receipted them, but no mention was made either in the attachment or the receipt, of the hives in which they were. *Held*, that the defendant was not liable for the hives under his receipt.

ACTION on a receipt given by the defendant to the plaintiff, an attaching officer, for property attached by him on a writ in favor

of *Noyes v. Bean*, in which suit judgment was rendered against the defendant therein at the December term of Caledonia county court, 1870, and execution issued. Plea, the general issue, and trial by the court, June term, 1872, Ross, J. presiding.

Ten swarms of bees were included in said receipt, but nothing was mentioned therein about the hives in which they were. At the time of said attachment, Bean owned a yoke of oxen and a mare, and he told the plaintiff that he elected to keep the mare in lieu of the oxen; but the plaintiff attached the mare instead of the oxen, and she was included in said receipt by the procurement of Bean. One cow was also receipted. The defendant left the property receipted in the possession of Bean, and before the rendition of judgment in said suit, said bees died under such care and treatment as men of ordinary care and prudence bestow upon their own property of a similar kind. On the 27th of January, 1871, the plaintiff went to Enosburgh and saw the defendant, and demanded the property named in said receipt. The defendant offered to get the property at once, except the bees, which, he informed the plaintiff, were dead, and deliver it to him, and asked him if he should deliver it to him at Lyndon, the plaintiff's residence, or at Irasburgh, Bean's residence, and the place of attachment. The plaintiff told the defendant that he need not deliver it at Lyndon, but that he would appoint a time and place of sale at Irasburgh, and he might deliver it there. The defendant said if Noyes would receive the property in existence at the prices named in the receipt, in part satisfaction of the judgment, he did not know but he would pay the balance. The plaintiff told him he would see Noyes or his counsel, about that proposition, and write him. The defendant also told the plaintiff that he could not deliver the bees, as they were dead, and that before he would pay the execution, or acknowledge his liability for the bees, he desired to take counsel. The plaintiff gave him time to see counsel, and went away. On the 6th of February, the plaintiff wrote the defendant that he had seen Noyes' counsel, and that he would sue the receipt unless the execution was paid in full. The defendant immediately wrote the plaintiff that he had taken counsel and had concluded that he

was not liable for the bees, but that he would deliver the other property at any time and place the plaintiff would name. No further communication was had between the parties, and nothing further done except the bringing of this suit. It was conceded that the hives in which the bees were when attached were worth \$2 each, but the defendant claimed that the attachment and receipt only covered the bees, and did not include the hives in which they were. Upon the foregoing facts, the court rendered judgment for the defendant. Exceptions by the plaintiff.

*George C. & George W. Cahoon*, for the plaintiff.

The statute provides what course shall be taken with perishable property. Instead of having the property appraised, as provided by the statute, the defendant by giving his receipt stepped in and agreed to the valuation of the property, and became security as contemplated in § 44, ch. 33, of the Gen. Stat. There could be no question, it would seem, as to the liability of the security under that section, whether the property perished or not. *Sawyer v. Mason*, 19 Me. 49. The defendant assumed the same liability. The measure of damages is the value of the property receipted. *Catlin v. Lowrey*, 1 D. Chip. 396; 1 Wash. Dig. 134, §§ 55, 59, 73; *Page v. Thrall*, 11 Vt. 230; *Bliss v. Stevens*, 4 Vt. 88; *Strong v. Hoyt*, 2 Tyler, 208; *Maxfield v. Scott*, 17 Vt. 634; 2 Wash. Dig. 109, §§ 41, 44; *Stimpson v. Pierce*, 42 Vt. 334. The defendant is in no sense a bailee for hire, therefore, the rule applicable to such bailees does not apply. *Brown v. Gleed et al.* 33 Vt. 147. The receipt, *ex necessitate*, includes the hives in which the bees were, and therefore, the defendant denying the plaintiff's right to the hives, his offer to deliver the other property did not include them, and the plaintiff can recover for them, unless prevented by some reason other than that he did not appoint a time and place for their delivery. The fact that Bean procured the mare to be receipted, operated as a waiver of his right of election, and makes a case entirely different from *Haskins v. Bennett*, 41 Vt. 700. Vide *Brown v. Gleed*, 33 Vt. 150. There is no pretence but that the cow was attached. A receiptor is estopped from denying that the property receipted

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was attached. Drake on Attach. § 349; *Brown v. Atwell*, 31 Me. 357; *Spencer v. Williams*, 2 Vt. 209; *Drew v. Livermore*, 40 Me. 266; *Lowry v. Cady*, 4 Vt. 505; *Morrison v. Blodgett*, 8 N. H. 238; 11 Mass. 219. An officer's right of action against a receiptor accrues upon his making a demand of the property. The plaintiff having made a demand, his right of action accrued at that moment. *Page v. Thrall*, *supra*; *Carpenter v. Snell*, 37 Vt. 256; *Tinker v. Morrill*, 39 Vt. 480.

*T. Bartlett*, for the defendant.

Had the plaintiff taken the bees into his own possession, and they had died without his fault, he would not be liable either to the debtor or the creditor. It follows, then, as a legal corollary, that his bailee would not be liable if they died without *his* fault.

The mare was exempt from attachment. At the time of the demand, the defendant agreed to get the property, except the bees, and deliver it at Irasburgh, at a time and place of sale appointed by the plaintiff; but this the plaintiff never did. Story Bailm. § 130, *et seq.*

The opinion of the court was delivered by

BARRETT, J. It has been for a long time settled in this state that an officer is not liable for property attached by him on *mesne* process, which has perished without fault for which he is answerable. *Bridges v. Perry*, 14 Vt. 262; *Walker v. Wilmarth*, 37 Vt. 289. It is equally well settled that a receiptor of such property is not liable on his receipt, when it has perished without like fault. The defendant, therefore, is not liable for the bees, they having died without such fault.

He is not liable for the other property. The case shows that he did not refuse to deliver the property when demanded by the plaintiff. On the occasion of such demand it was arranged between the parties that the defendant should deliver it at a time and place to be named by the plaintiff. This was a waiver of the duty to deliver it to the plaintiff on such demand, and left such demand operative to charge the defendant with the duty of delivering it only upon the appointment of a time and place for the delivery to be made, pursuant to said arrangement.

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Without naming such time or place, and notwithstanding the defendant was willing to deliver it at any time and place that the plaintiff would name, yet, without further demand, this suit was brought. We think the case as found by the court does not show a breach of the defendant's undertaking, in the sense of an actionable failure to deliver the property on demand. The record does not show that *hives* were either attached or receipted. A swarm of bees, as chattel property, the subject of traffic, and subject to attachment, does not, either in fact, in idea, or in law, by the force of the terms, as practically understood and used, embrace the hive, which, at a given time, they may be in. Each is quite susceptible of being apprehended in idea, and practically regarded and treated as property, separate and distinct from each other. We think, in order to hold the hives under the receipt, it is necessary that they should have been named in the attachment and in the receipt.

Judgment affirmed.

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WILLIAM LINDSEY AND WIFE v. THE TOWN OF DANVILLE.

*Evidence. Highways. New Trial.*

In an action in the name of husband and wife to recover for personal injuries to the wife, the defendant introduced testimony to prove that the husband, soon after the injury, in the presence of his wife, told the witness that the infirmity of his wife was caused by overwork in gathering and boiling sap. *Held*, that it was competent for the plaintiff to show by the same witness, and as part of the same conversation, that the wife then denied her husband's statement, and declared that she had not gathered and boiled sap.

Towns are bound to construct highways reasonably sufficient with reference to such accidents as should be expected occasionally to occur.

A new trial will not be granted on the ground of newly discovered evidence, when such evidence is not decisive in character, nor when, by due diligence, the party could have produced the evidence at the former trial.

CASE to recover for an injury to the wife of the plaintiff, William Lindsey, occasioned by the insufficiency of a highway in the town of Danville. Plea, the general issue, and trial by jury, December term, 1871, Ross, J., presiding. Verdict for the plaintiffs, and exceptions by the defendant.



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And now at this term the defendant preferred a petition to this court for a new trial, upon the ground of newly discovered evidence, and the exceptions and petition were heard together. The opinion discloses all material facts.

*B. N. Davis, C. H. Davis, and Dickey & Smith*, for the defendant, upon the question raised by the exceptions, cited *Alban et als. v. Pritchett*, 6 T. R. 680; and upon the question of a new trial, *Gilman v. Nichols*, 42 Vt. 313.

*O. S. & C. C. Burke*, for the plaintiffs.

The opinion of the court was delivered by

REDFIELD, J. This action is to recover damages for alleged injuries to the wife, by reason of an insufficient highway in the town of Danville.

I. The defendant offered evidence tending to prove that the plaintiff, William Lindsey, in the presence of his wife, declared to the witness, soon after this alleged injury, that the wife's infirmity was caused by hard work in the sugar-place in gathering and boiling sap. The plaintiff then offered to prove by the same witness, and as a part of the same conversation, that the wife denied her husband's statement as to herself, and declared that she had not gathered and boiled sap. The testimony was admitted, notwithstanding defendant's objection.

The testimony was clearly admissible. The wife is the party plaintiff; and the right to prosecute the suit would survive to her, on the death of the husband. The declaration of the husband would derive its main force from the presence of the wife, and her implied assent. A party affected by a conversation, or declaration, if used against him, is entitled, as a matter of right, to the whole. • And it would be very unreasonable and unjust that the wife, who repelled the suggestion at the time, as unfounded and untrue, must be left under the implication that she assented to it. The defendant may elect whether the conversation shall be put in evidence. But if the evidence is offered, the plaintiff is entitled to the whole. The defendant can take nothing by the exceptions.

II. The petition for new trial discloses that the highway was insufficient, and that the plaintiff, Mrs. Lincese, was, by the casualty, considerably injured. The holdback slipped over the iron, and let the wagon on to the horse's heels. Whether this condition of the harness evinced such negligence and want of care as to preclude the plaintiff's recovery, or should be referred to the concurrence of *accident* with an insufficient highway, in which case the plaintiff would not be barred, was a question of fact for the jury. Northrop, who was improved as a witness for the plaintiff, on the trial, now testifies that the holdback shown to the jury was not the one on the harness at the time of the accident, and that he was aware of the fact at the time he testified. If we were satisfied that the plaintiff *fraudulently* introduced in evidence another holdback, to deceive and mislead the jury, we should feel strongly inclined to grant a new trial, though we felt no very strong convictions that another trial would result in a different verdict. But we do not think the inference warrantable that plaintiff purposely perpetrated a fraud. Nor is it certain that the witness Northrop may not have been mistaken. Yet, if another holdback was, by mistake or otherwise, produced in evidence, it could not be very certain evidence of *negligence*. It was not claimed that it was made of improper material, or defective in form, or strength, but that it should have been buckled closer round the thill. And the fact that it slipped over the iron, renders it quite certain that there was a defect in this part of the tackle. And this is true in all cases where the harness or carriage gives way; as when a buckle gives out, a holdback breaks or slips, or a bolt or nut becomes loose, or lost. Such casualties often do, and are expected, occasionally, to happen; and our courts have repeatedly held that towns are bound to construct highways reasonably sufficient with reference to such accidents as should be expected to occur. The jury must have found the highway insufficient, and the holdback defective, in that it buckled too loosely round the thill; but the plaintiff not guilty of negligence. And we feel no assurance that the jury would not arrive at a like conclusion, with the benefit of Northrop's testimony.

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As to the other testimony attached to the petition, we think it not decisive in character, and that due diligence would have procured it for the trial before the jury. There is often in such cases a disposition to reticence among witnesses, until after the trial. But it is obvious that a diligent search, at the time, for all those who were present, or had the opportunity of seeing the occurrence, would have found the witnesses, whose affidavits are relied upon by the petitioner.

The petition for new trial is dismissed, with costs, and the judgment of the county court is affirmed.

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MARSHALL MONTGOMERY v. LEONARD F. EDWARDS.

*Trespass. Jurisdiction. Pleading. Gen. Stat., § 51, ch. 113.*

In actions of trespass on the freehold, the *ad damnum* in the writ is the "sum in demand," within the meaning of the statute conferring jurisdiction of such actions upon justices of the peace, and determines the jurisdiction.

Section 51, ch. 113, of the Gen. Stat., which gives treble damages in certain cases of trespass on real estate, does not create the right of action, but only gives cumulative damages for what was, and still is, actionable at common law.

The declaration alleged that the defendant entered upon the land of the plaintiff, and then and there, without leave or license of the plaintiff, cut down and carried away the trees of the plaintiff, of the value of fifteen dollars, then standing and growing upon said land, contrary to the form and force of the statute in such case made and provided, and to the damage of the plaintiff, fifty dollars. *Held*, that in reference to the question of jurisdiction, the action must be regarded as an action of trespass on the freehold, but that the declaration did not sufficiently count upon the statute to make it an action founded upon the statute aforesaid.

TRESPASS *qua. clau.* Plea, the general issue, and trial by jury, August term, 1872, ROSS, J., presiding. The declaration was as follows:

"For that the said defendant, heretofore, to wit, on the first day of May, A. D. 1870, and at divers other times between that time and the date of this writ, at Walden aforesaid, did enter upon the land of said plaintiff, said land being a part of lot number three in great lot number nineteen, in said Walden, and did then and there, without leave or license of said plaintiff, cut down and carry away a large number of trees of said plaintiff, of great

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value, to wit, ten spruce trees, ten fir trees, and ten birch trees, all of the value of fifteen dollars, said trees being then standing and growing upon said land; contrary to the form and force of the statute in such cases made and provided, and to the damage of the plaintiff, fifty dollars."

On trial the plaintiff introduced testimony tending to show that the defendant cut some spruce trees upon the land described in the declaration, and drew them away, and that their value was from six to eight dollars, and no more. The defendant made no question but the plaintiff owned the land where the trees were said to have been cut, and no testimony was offered tending to show that any question would be made as to the title of the land involved. The defence was a license to cut the trees. The defendant claimed that, upon the proof, the county court had not original jurisdiction, and moved to dismiss the action for that reason; but the court overruled the motion, and submitted the case to the jury, with instructions not excepted to. To the overruling of said motion, the defendant excepted.

The plaintiff claimed that he was entitled by his declaration to recover treble damages under § 51, ch. 113, of the Gen. Stat.; but the court ruled otherwise, and treated the action as an action of trespass at common law, and not an action founded upon said statute, and upon the special finding of the jury that the defendant, without the leave of the plaintiff, cut trees upon the plaintiff's land, of the value of five dollars and twenty-eight cents, rendered judgment for the plaintiff for that amount, and the same amount of costs; to which the plaintiff excepted.

*B. N. Davis*, for the defendant.

1. In order to recover a penalty given by statute, the facts constituting the offence must be set forth, and it must be alleged that the defendant has incurred the penalty thereby given. *Keyes v. Prescott*, 32 Vt. 86; *Evarts v. Allen*, 1 D. Chip. 116; *Bigelow v. Johnson*, 13 Johns. 428.

2. To cut trees on another's land as set forth in this declaration, was no penal offence at common law,—it was only made so by statute. Hence, the acts constituting the offence must be set forth in the declaration, and as constituting an offence against the

form, force, and effect of the statute in such case provided. *Fuller v. Fuller*, 4 Vt. 123; *Lee v. Clarke*, 2 East, 333; and the declaration should apprise the defendant that the plaintiff goes for the penalty. *Keyes v. Prescott*, *supra*. This declaration does not declare upon the statute, or that the acts complained of were committed against the statute.

3. In case the declaration had declared upon the statute, the court had the discretion to render judgment for single damages if it adjudged that the trees were cut by mistake, and the case does not show but this was the ground of the ruling of the court.

4. The declaration for a forfeiture, or penalty, should count for the penalty, so that the time of commencing the action may be minuted on the writ, agreeably to § 9, ch. 62, of the Gen. Stat., that the defendant may move to dismiss, if the statute is not complied with.

5. The county court had no original jurisdiction of this action. Gen. Stat., § 18, ch. 31. The plaintiff puts the case on the ground that the action is penal, and that, under the section on which he claims to have declared, he may go for the penalty without declaring *quare clausum fregit*. The defendant might have been in the lawful possession of the plaintiff's land by license, and cut a tree belonging to the plaintiff without license, and thereby incurred the penalty, so the declaration can hardly be construed as a declaration *quare clausum fregit*. The title of the plaintiff is not denied. There is no allegation that the defendant broke the plaintiff's close—no title of land was in controversy, and no injury to possession by the defendant is claimed. *Small v. Haskins et al.* 26 Vt. 209. If this declaration can be treated as *quare clausum fregit*, and the plaintiff entitled to recover only single damages, as the title of land was not called in question, a justice had original jurisdiction, as the declaration alleges, and the proof showed, the damages less than twenty dollars. *Small v. Haskins et al.*, *supra*.

*Marshall Montgomery, pro se.*

The court erred in treating the action as trespass on the freehold at common law. The pleader has set forth the cause of action in the words of the statute, and counted upon the statute in

the usual way, which is sufficient upon any public statute like the one referred to in this case. 1 Chit. Pl. 215; *Keyes v. Prescott*, 32 Vt. 86; *Reed v. Northfield*, 13 Pick. 94; Steph. Pl. 347-8.

The county court had original jurisdiction, because the title of land was in question. It was a necessary part of the declaration to aver title, and it was necessary to be proved—the general issue having been pleaded—and in such cases, a justice has no jurisdiction. Again, the *ad damnum* was over twenty dollars, and that is the test of a justice's jurisdiction in trespass *quare clausum fregit*. Gen. Stat. § 18, ch. 31; *Small v. Haskins et al.* 26 Vt. 209; *Jakeway v. Barrett*, 38 Vt. 316; *Flannery v. Hinkson*, 40 Vt. 485; *Scott et al. v. Moore et al.* 41 Vt. 205; *Burnett v. Ward*, 42 Vt. 80.

The opinion of the court was delivered by

PECK, J. The suit should have been dismissed on defendant's motion, if the county court had no original jurisdiction of the action. If the action is an action of trespass on the freehold, the county court had original jurisdiction. Whether the plaintiff under this declaration has the right to recover treble damages or not under the statute, the action is an action of trespass on the freehold, and must be so regarded in reference to the question of jurisdiction. The statute giving treble damages in certain cases of trespass on real estate, does not create the right of action, but only gives cumulative damages for what was, and still is, actionable at common law. The declaration charges the defendant with entering upon the land of the plaintiff, and then and there, without leave or license of the plaintiff, cutting down and carrying away trees then standing and growing on said land; and concludes to the damage of the plaintiff fifty dollars. The county court had original jurisdiction of the action, unless it is within the jurisdiction of a justice of the peace. The statute gives jurisdiction to a justice of the peace, "*of actions of trespass on the freehold where the sum in demand does not exceed twenty dollars.*" This is the limit of the jurisdiction of a justice of the peace in this form of action; and it is immaterial to the question of jurisdiction whether the title to the land is in fact disputed or put in issue on

trial or not. In actions of trespass on the freehold, and actions of assault and battery, and the like, the *ad damnum* in the writ is the "*sum in demand*," determining the jurisdiction. It is true that in trespass and trover for personal property, where the value of the property and interest is in general the limit of damages, with no evidence tending to show that the plaintiff has a right to receive a sum exceeding the jurisdiction of a justice, and it appearing that he had no reason to suppose he could recover beyond that sum, it has been decided that the county court may dismiss the case for want of original jurisdiction, because in such case the plaintiff can more easily judge in advance to which jurisdiction his case properly belongs. But even if we should apply the same rule to the case at bar, no error appears in the decision of the county court in overruling the motion; as that court may have found that the plaintiff in good faith supposed that he could recover more than twenty dollars damages; especially in view of the fact that he claimed to recover treble damages. The defendant's exception therefore is overruled.

The exception by the plaintiff is to the decision of the county court treating the action as trespass on the freehold for cutting and removing trees and timber, and not an action upon § 51 of ch. 113, Gen. Stat., which gives, *under certain circumstances*, "treble damages by action founded on this statute, together with costs of prosecution," against the party who "shall cut down, destroy. or carry away any tree or trees whatever, placed or growing for use, shade or ornament, or any timber, wood or underwood standing, lying, or growing on the land of any other person, without leave or license from the owner or owners of such lands." It will be noticed that the statute gives treble damages only "*by action founded on this statute.*" It is therefore necessary, in order to entitle the plaintiff to recover treble damages, that the action by the declaration should clearly appear to be founded on the statute, indicating that the plaintiff claims to recover the treble damages; otherwise the defendant would have the right, and the court would be bound, to treat it as an action of trespass at common law. There is nothing in the form of action in this case that indicates such claim; the action being the appropriate

action at common law for single damages. The statute does not prescribe the form of action. Notwithstanding the statute, the remedy at common law still exists; and to recover treble damages, the declaration must count upon the statute. It is not sufficient to simply state such facts as would bring the case within the statute; it must appear by the declaration in some form, unequivocally, that the plaintiff claims to recover treble damages by force of the statute. Where the same facts that would make out a case under the statute, would also make out a case at common law, the declaration must show in some form that the plaintiff grounds his action on the statute; otherwise it will be treated as a common law action. The common mode of counting upon a statute, is to designate the action, in the commencement of the declaration, as an action upon the statute, with the proper description of the form of action, and reference to the statute. But it is not indispensable, in a case like this, to designate the action as founded on the statute, *in terms*, if in the body of the declaration there are other equivalent words showing that the plaintiff claims by force of the statute, &c.—as an allegation that thereby the defendant became liable by force of the statute, &c.; or, by means of the premises and by force of the statute in such case provided, on action accrued, &c. The only reference to the statute, or allegation in the declaration in the case at bar, to show the action is founded on the statute, is the concluding words,—“contrary to the form and force of the statute in such case made and provided.” It is insisted that this is sufficient. No case is cited which goes to this extent. *Burnett v. Ward*, 42 Vt. 80, was an action upon the statute to recover double damages for the worrying and killing of plaintiff's sheep by the defendant's dog, counting specially “*in a plea of trespass given and had under and by force of the ninth section of chapter 104 of General Statutes*,” &c.; and the only question was whether the plaintiff was bound to prove his case beyond a reasonable doubt, as in criminal cases. It is said in the opinion in that case, that it has often been held that in an action by the party aggrieved, on a statute which gives cumulative damages to the party aggrieved, the declaration need not contain all that would be required in a declaration on a penal statute for the



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penalty ; that it need not conclude *against the form* of the statute ; and several cases are cited to the point that such conclusion was not indispensable, as in *Reed v. Northfield*, 13 Pick. 94, cited also by the plaintiff's counsel in this case. That was an action on the statute against the town for double damages for an injury sustained by a defect in a highway. But in that case the declaration contained the usual averment—"whereby," &c., "and by force of the statute in such case made and provided, the said inhabitants," &c., "became liable to pay to the said James double the damages by him sustained by reason of the premises aforesaid." This was held, after an elaborate discussion of the question, both by counsel and court, to be a sufficient counting upon the statute, without the formal conclusion, against the form and force of the statute. The other case referred to by the plaintiff, *Keyes v. Prescott*, 32 Vt. 86, does not aid the plaintiff, but makes against him. That case was upon the same statute relied on in this case ; and the declaration, after stating the facts, and alleging the value of the tree cut and carried away, contained the words, "contrary to the statute in such case made and provided," and added, "*whereby and by force of the statute in such case made and provided, the plaintiff is entitled to recover of the defendant treble the value of said tree, amounting in the whole to the sum of,*" &c. ; yet the court were divided on the question whether it could be treated as an action upon the statute, or a common law action of trespass ; a majority of the court holding that it should be treated as an action upon the statute. It is evident from the majority opinion in that case as published, that it was based mainly on the last of the two averments above stated. We think something more than what is alleged in the declaration in the case at bar, was necessary to constitute it an "*action founded on this statute.*"

Judgment affirmed.

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Roberts, administrator, v. Lund.

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DANIEL ROBERTS, ADMINISTRATOR OF SUSANNAH LUND, v. JONATHAN LUND.

*Competency of Witness under Gen. Stat. ch. 36, § 24. Right of Administrator of wife to maintain suit at law against her husband. Fraudulent Conveyance. Reduction of wife's Choses in Action to possession by her husband.*

In trover for certain mortgage notes, brought by the administrator of the wife against the husband, the plaintiff's testimony tended to prove that the defendant at some time admitted that said notes belonged to the intestate. *Held*, that the defendant was not a competent witness to any matter that occurred prior to the appointment of the administrator.

The administrator of the wife can maintain any proper action at law against the husband for the enforcement of her rights of property.

If a husband, to avoid being compelled by the town to contribute to the support of his pauper mother, conveys land to his wife without consideration, such conveyance is good between the parties; for the law will not permit a party to allege his own fraud to avoid his contracts, or the legal consequences of his own act.

TROVER for certain mortgage notes. Trial by jury, December term, 1871, Ross, J. presiding, and verdict for the plaintiff.

In 1844, the defendant conveyed certain real estate which he owned in Groton, to the father of the intestate, who, on the same day, conveyed the same to the intestate, all without consideration. In 1867, the defendant and his wife, the intestate, sold and conveyed the same to one Wormwood, who executed the notes in question to the intestate, or bearer, for the purchase money thereof, and secured the same by mortgage thereon. The plaintiff's evidence tended to show that, at the time of the conveyance to the intestate as aforesaid, the town of Groton was proceeding against the defendant to compel him to contribute to the support of his mother, who was then a town charge, and that in that proceeding the defendant testified that said real estate was the property of his wife.

The defendant claimed that the foregoing evidence tended to show that the premises were deeded to the intestate as aforesaid, for the reason that the town of Groton was endeavoring to make the defendant support his mother, and was done for the purpose of

getting rid of aiding in her support. The defendant also claimed, and his evidence tended to show, that said property never in fact belonged to the intestate, but that she held it for the defendant. It appeared that at the time of the execution of the mortgage and the notes as aforesaid, the same were delivered to the defendant in the presence of the intestate, and that the defendant had kept them in his possession ever since; and the evidence showed that said Wormwood had paid to the defendant the amount of three or more of said notes, and had never paid anything thereon to the intestate, but had frequently offered to, but that she always declined to take the money, and directed him to pay it to the defendant. There was no evidence that the defendant did any act in regard to said notes against the will of the intestate, or without her consent, express or implied. The only question on this point was, whether he acted as her agent, or for himself; in regard to which, the evidence was not clear or positive, but reconcilable with either claim.

The plaintiff's evidence tended to show that the intestate had some property at the time of her marriage with the defendant, and that she received about \$250 from her father's estate in 1848 or 1850, and had at various times during their marriage been known to have money of her own. The evidence also tended to show, that the defendant had made certain statements with reference to the ownership of the mortgage and the notes in controversy, and that he had at some time stated that said notes and mortgage belonged to the intestate. The defendant offered himself as a witness to contradict such evidence, and as a witness generally to testify in the case.

The plaintiff objected to the defendant's testifying, for the reason that his wife was dead, wherefore he was disqualified as a witness. The court excluded his evidence, and ruled that he could not testify upon any point, except matters that had transpired since the appointment of the administrator; to which the defendant excepted. The defendant claimed, and asked the court to rule, that an action at law could not be sustained by the administrator of the wife against the husband. The court held otherwise; to which defendant excepted.

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The defendant requested the court to instruct the jury that, if they found that said land was deeded to the intestate as aforesaid for the purpose of keeping the same from the town, to get rid of supporting his mother, and if it was understood that the property was really the defendant's, and that the intestate never claimed it as hers, then that said property in fact belonged to the defendant. The court refused so to charge, but did charge that, if the defendant caused said property to be deeded to his wife for the purpose of getting rid of a liability to assist in the support of his mother, it would be an act of fraud on his part, of which he could take no advantage, and the court would not aid him to recover the property against his own fraud, but told the jury that, if the wife took the deed, and held the land in trust for the defendant, and was willing to and did surrender it to him, that she could do so, and if she had done so, said mortgage and notes would be the property of the defendant.

The defendant also requested the court to charge that, although the notes were payable to the intestate or bearer, still, if the jury found that she never had the notes in her possession, and never claimed them as her property, and that the defendant always controlled them as his property, and they were placed among his effects, and were never given to the wife, and he never admitted that he held them in trust for her, and in all other respects acted as the owner thereof, that such acts would constitute a sufficient reduction to possession to make them his property.

The court refused to charge as requested, but did charge that in regard to the reduction to possession, the doctrine did not apply with much force, as the evidence on both sides was rather as to who owned the notes, than that she owned them and he had reduced them to his possession against her will, and that if the notes belonged to her, in order for the defendant to sufficiently reduce them to possession, he must have either sold or endorsed them to a third party, or collected them. The court charged fully on all the points arising in the case in a manner not excepted to by the defendant, and fully explained the general propositions contained in those portions of the charge detailed, to which exception is taken. To the refusal to charge as re-

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quested, and so much of the charge given as is above detailed, the defendant excepted.

*O. S. & C. C. Burke*, for the defendant.

At the time of the conveyance to the intestate, it does not appear that there were any creditors of the defendant; nor does it appear that the heirs of the intestate had any claim against him. Hence, the question of fraud is not applicable in this case. Gen. Stat. ch. 113, §§ 32, 33, and cases there cited.

The defendant was a competent witness to contradict the plaintiff's testimony that he had stated that said notes and mortgage belonged to the intestate. At all events, to exclude him as a witness on that point, it should have appeared that such statements were made before administration granted. This court cannot assume that they were before. *Morrill, adm'r, v. Pinney*, 43 Vt. 605.

It is well settled that the wife cannot sue the husband at law. *Porter et al. v. Bank of Rutland*, 19 Vt. 410. How can the wife's administrator have any better or different rights than she has? Notwithstanding the reasoning and views of the court in *Albee, adm'r, v. Cole*, 39 Vt. 319, the point was left undecided, and is still an open question in this state.

The refusal to charge as requested as to the reduction to possession by the defendant, was error. What is sufficient to constitute a reduction to possession of the wife's choses in action by the husband, has not been fully decided in this state; but it has been held that he must do some positive act; but that he must either sell or indorse notes to a third party, or collect them, we deny. Any act on the part of the husband, which clearly shows an intention to make the wife's choses his own, is a sufficient reduction to possession, and bars the wife's right to survivorship. 1 Parsons Cont. 332, n.; Bing. Inf. 21, notes, and cases there cited; Schou. Dom. Rel. 119.

*Dickey & Smith and Leslie & Rogers*, for the plaintiff.

The defendant was not a competent witness in his own behalf. Gen. Stat. ch. 36, § 24; *Fitzsimmons v. Southwick*, 38 Vt.

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509; *Ford's Ex'rs v. Cheney*, 40 Vt. 153; *Hollister, adm'r, v. Young*, 41 Vt. 156.

An action at law will lie against the husband in favor of the administrator of the wife. *Manwell, adm'r, v. Briggs*, 17 Vt. 176; *Caldwell, adm'r, v. Renfrew*, 33 Vt. 213; *Albee, adm'r, v. Cole*, 39 Vt. 319.

It is well settled that if one puts his property into the hands of another for the purpose of avoiding any debt, right, or duty, it is a fraud, and a court will not aid him to recover it back. Gen. Stat. ch. 113, § 32; *Peasley v. Barney*, 1 D. Chip. 331; *Adm'r of Martin v. Martin*, 1 Vt. 91; *Walker v. Ferrin*, 4 Vt. 523; *Weeks v. Burton*, 7 Vt. 67; *Carpenter v. McClure*, 39 Vt. 9.

There was not a sufficient reduction of the notes to the defendant's possession to make them his property. Redf. Wills, Part II, 175, (2); Reeve Dom. Rel. 55, notes and cases cited; 2 Kent Com. 113; *Driggs, adm'r, v. Abbott*, 27 Vt. 580; *Wilson et. al. v. Bates, adm'r*, 28 Vt. 765; *Barber v. Slade et als.* 30 Vt. 191.

The opinion of the court was delivered by

REDFIELD, J. This action is trover for the conversion of certain mortgage notes and United States bonds. The question in issue was the title of the property. The defendant was the husband of the intestate at the time of her decease.

I. The plaintiff's testimony tended to prove the defendant had admitted that the property belonged to the wife. The court, on motion of the plaintiff, excluded the defendant as a witness to any matter that occurred prior to the plaintiff's appointment as administrator. To this ruling the defendant excepted. We think the defendant can take nothing by this exception. The case falls within the rule established in *Fitzsimmons v. Southwick*, 38 Vt. 509. The cases of *Hollister, adm'r, v. Young*, 42 Vt. 403, and *Merrill, adm'r, v. Pinney*, 43 Vt. 605, are not in conflict with this rule.

II. It is claimed that, as the intestate, by reason of coverture, could not maintain this action, it could not be maintained by her administrator. *Coverture* is a personal disability, springing from

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the conjugal relation, and does not attach to her administrator. The plaintiff, as her administrator, succeeds to all her rights of property, and can maintain any proper action to enforce them. *Caldwell, adm'r, v. Renfrew*, 33 Vt. 213. *Albee, adm'r, v. Cole*, 39 Vt. 319.

III. If the land, which was the source of these mortgage notes, was conveyed to the wife, through her father, to avoid contribution to the support of his mother, and without consideration, it would be fraudulent and void as against those who sought to enforce such duty, yet it would be good between the parties. For the law will not permit a party to allege his own fraud, to avoid his contract, or the legal consequences of his act.

IV. The request to charge that the acts of the husband had so far reduced the notes to possession as to defeat her right of survivorship, cannot be sustained. So long as any act remains to be done to bring the avails of choses in action to the beneficial use of the husband, the wife's right of survivorship remains. *Heirs of Holmes v. Adm'r of Holmes*, 28 Vt. 765; Redfield on Wills, 2, 175-6.

Judgment of the county court is affirmed.

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ELLA R. SHATTUCK, BY NEXT FRIEND, v CHARLES GAY AND ORVILLE R. KELSEY.

[IN CHANCERY.]

*Effect of answer as Evidence. Reforming Contract.*

When the material facts upon which the orator relies in his bill are denied in the answer, the rule is well settled that something more than the testimony of one witness is required to sustain the averments of the bill. What is deemed equal to the testimony of two witnesses is required.

Equity requires clear and full proof to warrant the reforming of a contract, and especially a deed.

APPEAL from the court of chancery. The bill was taken *pro confesso* as to the defendant Kelsey, but was answered by the

defendant Gay, and the answer was traversed, and testimony taken.

The oratrix's mortgage, by its terms, was made subject to Hiram Kelsey's mortgage and to the defendant Gay's mortgage, and the minute of the town clerk upon said first named mortgage, and the town records, showed that the same was received for record half an hour later than the said Gay's mortgage. The other facts sufficiently appear in the opinion of the court. The court of chancery, Ross, Chancellor, decreed that the oratrix's mortgage take precedence of the said Gay's mortgage, and be so reformed as to be subject only to the mortgage of Hiram Kelsey, and that the oratrix recover her costs. Appeal by the defendant Gay.

*O. S. Burke*, for the oratrix.

A court of equity considers that as done which is agreed to be done. It corrects mistakes in conveyances when clearly and unequivocally proved, and makes the instrument such, both in form and effect, as will fulfill the intention of the parties. *Beardsley v. Knight et als.* 10 Vt. 185; *Goodell v. Field*, 15 Vt. 448; *Preston v. Whitcomb*, 17 Vt. 183; *Blodgett et als. v. Hobart et als.* 18 Vt. 414.

*Edwards & Dickerman*, for the defendant Gay.

As to the effect of an answer responsive to the bill, and the weight to be attached to it, see 2 Story Eq. § 1528; *Allen v. Mower*, 17 Vt. 61; *Porter et al. v. Bank of Rutland et als.* 19 Vt. 425; *Heirs of Adams v. Adams et al. adm'rs*, 22 Vt. 68-9; *Blaisdell v. Bowers et al.* 40 Vt. 129-30; *Rich, adm'r, v. Austin*, Ib. 420; and as to the weight of evidence to sustain the bill, and the rule generally governing cases like the one at bar, see 1 Story Eq. §§ 152, 156, 157, n. 3; 1 Wheeler's Am. Ch. Dig. 341-2; 1 Greenl. Ev. § 260; 3 Ib. § 360, n. 1.

The opinion of the court was delivered by

REDFIELD, J. This is a bill in equity to reform a mortgage deed, and give it preference to the mortgage deed on the same premises held by the defendant Gay.



No question is made in argument that the order of the court of chancery, suppressing certain testimony, was improperly made.

The oratrix, in the bill, avers that it was agreed between herself and Orville R. Kelsey, her mortgagor, and assented to by defendant Gay, that her mortgage should take the precedence. Defendant Gay sold the farm to Orville R. Kelsey, then incumbered by a mortgage to Hiram Kelsey for \$2,800. Orville R. hired of the oratrix \$1,000, and paid the same to Gay as part of the purchase money. There is no doubt, upon the testimony, that it was fully agreed between the oratrix and Orville R. that she should have security for the loan by mortgage on said farm, subject only to the Hiram Kelsey mortgage. The town clerk, who wrote the two mortgages, testifies that Gay, being present, was aware of this arrangement, distinctly assented to it, and instructed him to give the oratrix's mortgage precedence in the record; and that, by mistake, he made the oratrix's mortgage subject to Gay's mortgage. Orville R. Kelsey, fully and in detail, affirms the contract between the oratrix and himself, the assent of Gay to that arrangement, and supports the testimony of Chase, the town clerk, as to the distinct agreement of Gay at the time the mortgage deeds were executed. The oratrix's mortgage was first recorded. The defendant Gay, both in his answer and his testimony, denies such agreement or assent on his part; and the answer is responsive to the bill. Where the material facts upon which the orator relies in his bill are denied in the answer, the rule is well settled that something more than the testimony of one witness is required to sustain the averments of the bill—what is deemed equal to the testimony of two witnesses. And we entirely concur with the defendant's solicitor, that equity law requires clear and full proof to warrant the reforming of a contract, and especially a deed. Yet, every case of this kind has its own circumstances, which give to it a *character*, and each makes its own impression upon the minds of the court.

The defendant Gay knew that the \$1,000 paid to him as part of the purchase money, was borrowed of the oratrix. It is not reasonable that he was thoughtless and silent upon the manner and quality of her security. Nor is it probable that the town

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clerk should have made two mortgages upon the same land, and placed one on record, in the presence of the parties, or their agents, and no enquiry or suggestion made as to which should have priority. In short, we believe the testimony of the town clerk is natural, is corroborated by the circumstances, and is substantially true. And the evidence satisfies the court that "there was a plain mistake, clearly made out by satisfactory proofs." 1 Story's Eq. § 157.

We feel no inclination to modify the just and conservative rule, that written contracts, and more especially deeds, must be held to express the deliberate purpose of the parties, and should not be changed but upon the most clear and full proof, and such as shall establish the fact beyond reasonable doubt.

The decree of the court of chancery is affirmed, and the cause remanded.

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AARON H. SMITH v. L. D. HILL, F. C. HARRINGTON, AND FRANCIS RICHARDSON.

*Partnership. Practice.*

If one suffers another to hold him out as a partner, or to use his name in business as such, he is liable as a partner on a contract thus made, although in fact he has no interest in the business of such partnership.

H. and Harrington were never partners, and no such firm as H. & Co. ever existed; but Harrington gave the plaintiff a note for some staging property purchased by him, signed, "H. & Co. by Harrington," without the knowledge of H. Two or three years before said note was given, H. was informed that Harrington was using the name of H. & Co. in his staging business, and he afterwards saw Harrington and told him he must not use that name to injure him, and he said he would not. The plaintiff did not know of such previous use of that name at the time said note was given, and it did not appear whether Harrington made any representations to him at that time. *Held*, that H. was liable on said note.

*Held*, also, that, inasmuch as the signature to said note disclosed the name of H., it made no difference that the plaintiff did not know of the previous use of H.'s name as aforesaid, at the time said note was executed, for the legal intent is, that the payee takes a note upon the faith of the persons whose names appear upon it as makers.

In cases tried by the court in the county court, when the facts are found by that court, it is the common practice of the supreme court, if the judgment of the county court is reversed, to proceed and render such final judgment as the facts warrant.

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Smith v. Hill et als.

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ASSUMPSIT upon a promissory note, signed "L. D. Hill & Co. by F. C. Harrington," and also by Francis Richardson. Plea, the general issue, and trial by the court, June term, 1872, Ross, J., presiding.

There never existed any such firm as L. D. Hill & Co. None of the defendants were ever in company with each other in any kind of business. Two or three years before said note was given, a man in Island Pond notified the defendant Hill, that Harrington was using the name of L. D. Hill & Co. in his staging business. Hill afterwards saw Harrington, and told him he must not use that name to injure him, and Harrington said he would not. Hill knew nothing of the giving of said note till about the time this suit was commenced. It did not appear that the plaintiff knew of the previous use of Hill's name by Harrington in his staging business; nor did it appear whether Harrington made any representations to the plaintiff at the time he signed the note. At that time he gave the plaintiff's notes to the amount of \$1600 for the purchase of some staging property, and paid them himself, except the balance due on the note in question. Hill was never called upon to pay anything on paper thus signed, until this suit was brought. There was no service on Richardson, and Harrington made no defense. Judgment for the defendant Hill, and against the defendant Harrington. To the rendition of judgment for Hill, the plaintiff excepted.

*C. H. Davis*, for the plaintiff, cited *Cottrill v. Vanduzen et als.* 22 Vt. 511; *Stearns v. Haven et als.* 14 Vt. 540; *Kellogg v. Griswold*, 12 Vt. 291; *Bailey v. Clark*, 6 Pick. 572; and insisted that Hill acquiesced in Harrington's use of his name after it came to his knowledge, and fully authorized him to continue its use.

*Belden & May*, for the defendants, cited *Carter v. Whalley et als.* 1 B. & Ad. 11; *Parsons Part.* (marginal) 119, 124, 130; *Stearns v. Haven et als. supra*; *Hicks et al. v. Cram et al.* 17 Vt. 449; *Cottrill v. Vanduzen et als. supra*; *Young v. Axtell*, 2 H. Bl. 242; *Wood v. Pennell*, 51 Me. 52; *Mathews v. Felch et als.* 25 Vt. 536; 3 Kent Com. 33.

The opinion of the court was delivered by

PECK, J. If one suffers another to hold him out as a partner, or to use his name in business as such, he is liable as a partner on a contract thus made, although in fact he has no interest in the business of such partnership. When the defendant Hill was informed that Harrington, in his staging business, was using his name, under the name of L. D. Hill & Co., it does not appear that he forbid it, but that he afterwards saw Harrington and told him he must not use that name to hurt him, and that Harrington replied that he would not. The fair import of this is, that Hill acquiesced in such use of his name, on Harrington's assurance that he would not thereby injure him, or, in other words, that he would not thus use his name beyond his ability to indemnify him, and that he would save him harmless. The risk of Harrington's neglect to redeem this pledge was upon Hill, and not upon those to whom Harrington should, in his staging business, thus pledge the credit of Hill. It makes no difference that Hill knew nothing of the giving of the note in question till about the time of the commencement of the suit. It is urged by the defendant's counsel, apparently with great confidence, that as it did not appear that the plaintiff ever knew of the previous use of the defendant Hill's name by Harrington in his staging business, nor what representations, if any, Harrington made to Smith, the plaintiff, at the time he executed the note by the name of L. D. Hill & Co., the defendant Hill cannot be held liable. This would be material, if the signature did not disclose the name of Hill; as it might then be urged that the plaintiff did not take the note relying on the credit of Hill. But as the name of the defendant Hill appears specifically upon the face of the note as one of the makers, the case is quite different, since the legal intendment is, that the payee takes a note upon the faith of the persons whose names appear upon it as makers. The common practice of this court is, in cases tried by the court when the facts are found by the county court, if the judgment of the county court is reversed, to proceed and render final judgment, such as the facts warrant; but in this case we conclude to reverse the judgment, and grant a new trial.

Judgment reversed and new trial granted.

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Willard v. Danville.

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## A. J. WILLARD v. THE TOWN OF DANVILLE.

*Attorney. Authority implied by Law.*

As a general rule, an attorney employed as such in a cause, has not thereby the incidental power to pledge the credit of his client by employing another attorney as an assistant. But, where the facts in a particular case are such that it may fairly be inferred from them that such authority was given, this general rule would yield.

Where the agent of a town for prosecuting and defending suits was not present at the trial of a suit against the town, but was at his home in a town adjoining the place of trial, and had done nothing about the suit, except consult once with the attorney for the town, to determine upon the necessary preparation for defence, and procure the attendance of the necessary witnesses at the trial, in other respects the care and responsibility of the trial being left with said attorney, who resided at the place of trial, nothing appearing to indicate that said agent might not have been seasonably consulted on the subject of employing assistant counsel, nor that any thing transpired, or came to light, rendering counsel necessary, which was not known to said attorney and agent at the time of such consultation, it was held, that said attorney had not therefore authority implied by law to bind the town by the employment of assistant counsel in the case.

GENERAL ASSUMPSIT. Plea, the general issue, and trial by jury, December term, 1871, Ross, J., presiding.

The plaintiff's claim was for services as an attorney in the trial of a suit, *Howard v. Danville*, at the June term of Caledonia county court, 1867, and before the supreme court at the August term, 1867. No question was made in regard to the performance of the services, or the reasonableness of the charges. The plaintiff admitted that he was employed in behalf of the town by J. D. Stoddard, Esq., and by no other person. The only question litigated was whether Stoddard had authority to employ assistant counsel. It was admitted that Stoddard was employed by Joseph H. Fuller, who was the agent of the defendant for 1866, to defend said suit, and three others, which were brought by soldiers for the recovery of bounties. It appeared that J. S. H. Weeks was agent of the town for 1867, but was not present at the time of trial. It was not claimed that Weeks gave Stoddard any authority to employ assistant counsel. Weeks had but one interview with Stoddard prior to the trial of said cause, at which time he learned what witnesses would be wanted, and summoned them, and had them in attendance at court, but did nothing further about the trial of the case. It appeared that at the time the sol-

diers were enlisted; Wm. J. Stanton was first selectman of the defendant town, and was knowing to the contract, and was a witness for the town in said cause; that Stoddard consulted with him in regard to the case, and that he sat by the counsel and made suggestions at the time of trial. Stanton was not selectman of the town in 1866, or 1867, and it was not claimed that he ever authorized Stoddard to employ the plaintiff, but Stoddard's testimony tended to show that Stanton knew he must have assistance, and knew that he employed the plaintiff. Stoddard was a witness for the plaintiff, and on cross examination testified: "I don't pretend to state that Fuller authorized me to employ assistance." Knew he knew Stanton was the principal man, and Stanton knew whom I had employed." He was asked if he testified before the justice in the trial of this case anything about Stanton's being active at the trial of the Howard case, or of his knowing he had employed the plaintiff, and he answered that he thought he did. The defendant used C. H. Davis, Esq., as a witness to what Stoddard testified to before the justice, and who testified that Stoddard did not there testify anything about Stanton's having anything to do with the trial of the Howard case, but did there testify that "he was employed generally by Fuller to employ counsel in the suit." Stoddard, on being recalled, among other things, testified: "I might have stated before the justice, and I state now, that Mr. Fuller left the whole matter to me to conduct the suit as I thought best, to make the defence available." Fuller was a witness for defendant, and his testimony tended to show that he gave Stoddard no authority to employ assistant counsel in the suits for soldiers' bounties, but did in another suit of *Cowdry v. Cowdry*, in which the town was interested, and that he employed Mr. Stoddard for the town. The plaintiff requested the court to charge the jury:

"First, that if the jury find that Mr. Stoddard was employed by the town agent as counsel to take charge of this suit, with others, and to have the charge and direction of the same, with power to employ counsel as he might judge best, the defendant would be liable. Second, that if the jury find that the town agent resided in another town from where the court was held, and that he left to Mr. Stoddard the sole care and responsibility of

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the trial of the case, and he employed the plaintiff to assist him, the town would be liable."

The court substantially complied with the plaintiff's first request, but declined to charge as secondly requested. The court instructed the jury that the plaintiff must satisfy them, not only that he performed the services for which his charges were made, but also that he performed them at the express or implied request of the town; that the town agent, or selectmen, were duly authorized to make such request, and that they could employ or authorize Stoddard to make such request for them on behalf of the town; that Stanton, being but a citizen of the town and a witness in the case, and not an agent of the town, could not authorize Stoddard to make the request, or employ the plaintiff, neither would the fact that he was present at the trial, and knew of the employment of the plaintiff by Stoddard to aid in the trial, bind the town; that the simple employment of Stoddard by the defendant as an attorney in the case, would not authorize him to employ the plaintiff to assist him on behalf of the town; and that it was incumbent on the plaintiff to satisfy them that Stoddard had such authority from the town agent, Fuller; and that in determining whether Stoddard had such authority, they would consider the testimony of Stoddard, of Fuller, and the other witnesses, the probability whether Stoddard would employ plaintiff without he had authority, and all the circumstances of the case, and also the fact that the town agent was not present at the trial, but left the management of the trial to Stoddard. The charge in other respects was such as the case required, and satisfactory to the plaintiff. The jury returned a verdict for the defendant. To the refusal to charge as requested, and to so much of the charge as is above detailed, the plaintiff excepted.

*A. J. Willard, pro se*, cited *Paddock v. Colby*, 18 Vt. 485; *Briggs v. Georgia*, 10 Vt. 68; *Hopkins v. Willard et al.* 14 Vt. 474; *Kimball v. Perry*, 15 Vt. 414; *Beckland v. Conway*, 16 Mass. 396; *Langdon v. Castleton*, 30 Vt. 285.

*C. H. Davis*, for the defendant, cited *Paddock v. Colby, supra*; *Paley Agency*, 390; 2 Kent Com. 633.

The opinion of the court was delivered by

PECK, J. The case states that "the only question litigated was whether Mr. Stoddard had authority to employ assistant counsel," and therefore this is the only question before this court. It appears that Fuller was the town agent of Danville for the year 1866, and as such, in the time of his agency, employed Stoddard as attorney to defend the suit, Howard against Danville, in which the plaintiff, under an employment by Stoddard, at the June term of the county court, 1867, rendered the services as assistant counsel, for which he claims to recover. Weeks was the town agent for the year 1867, and it appears that he had an interview with Stoddard prior to the trial at the June term, 1867; and learned what witnesses would be wanted, and summoned them, and had them in attendance, but did nothing further about the trial, and was not present at the trial, and the case states that it was not claimed that Weeks gave Stoddard any authority to employ assistant counsel. Therefore, so far as any such authority *in fact* can be claimed to have been conferred on Stoddard, beyond what would result as matter of law under the circumstances, from his employment as attorney to defend the case, it must depend on the employment of Stoddard by Fuller. This question of fact was left to the jury under a charge as favorable to the plaintiff as he could reasonably ask. It is evident from the portion of the charge given in the exceptions, that the jury, in order to find for the plaintiff, were not required to find that authority to employ assistant counsel, was, in express terms, given to Stoddard; but that they were allowed to infer from the facts and circumstances proved in the case that such authority was given. But the jury have found that no such authority was given. Had the jury found such authority given, then under the charge, in accordance with the defendant's first request, which the case states was substantially complied with, the verdict must have been for the plaintiff.

But it is insisted on the part of the plaintiff, that he was entitled to a charge according to the second request, which is, "that if the jury find that the town agent resided in another town from where the court was held, and that he left to Mr. Stoddard the sole care and responsibility of the trial of the case, and Stoddard



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employed the plaintiff to assist him, the town would be liable." To determine the correctness of this proposition, it must be viewed in connection with other facts in the case not in dispute. It appeared that the town agent resided in another town than that in which the trial was, and did not attend the trial; but it appeared that, preparatory to the trial, he had an interview with Stoddard, and learned what witnesses were necessary, and summoned them, and procured their attendance at the trial; so that the whole preparation of the case for trial, as appears by the conceded facts in the case, was not left to Stoddard. This, together with the further fact in the case, that it was not claimed at the trial that Weeks, the town agent, gave Stoddard any authority to employ assistant counsel, leaves no ground on which the plaintiff can be entitled to a charge in accordance with this second request, unless, as matter of law, Stoddard had authority to employ assistant counsel, by virtue of his employment as attorney to defend the suit. As a general rule, an attorney employed as such in a cause, has not thereby the incidental power to pledge the credit of his client by employing another attorney as an assistant. This was held in *Paddock v. Colby*, 18 Vt. 485. In *Briggs v. Georgia*, 10 Vt. 68, the same principle is recognized. Where the facts in a particular case are such that it may fairly be inferred from them that such authority was given, this general rule would yield. So far as this inference is a question of fact, the plaintiff in this case has had it submitted to the jury, and the jury have found against him. But it is insisted on the part of the plaintiff, that in view of the fact that the town agent, Weeks, was absent from the trial, and left Stoddard to conduct the trial without his attendance, authority in Stoddard to employ assistant counsel is implied as matter of law. It is true, an agent of a foreign principal, so distant that he has not time to communicate with him for instructions, is sometimes held to have authority in an unexpected emergency, that he would not have if his principal were present, or so near as to afford an opportunity seasonably to consult him. The same principle applies to an attorney at law, in a case proper for its application; and under peculiar circumstances, authority to employ assistant counsel would be implied. In this case, how-

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ever, Weeks, the town agent, resided in the vicinity of the residence of Stoddard, and of the place of trial, in an adjoining town; and nothing appears indicating that he might not have been seasonably consulted on the subject of employing assistant counsel; nor does it appear that anything transpired, or came to light, rendering assistant counsel necessary, which was not known to Stoddard and Weeks at their interview when they determined upon the necessary preparation for the trial. It is evident from the report of *Paddock v. Colby*, that the client of the attorney who employed assistant counsel was not present at the trial. It is fairly to be inferred from the auditor's report, although it is not so stated in express terms, and the counsel in that case, on both sides, evidently so considered it in their briefs as reported.

The case at bar comes within the general rule on this subject, and the plaintiff's exceptions cannot be maintained.

Judgment affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
AT THE  
GENERAL TERM,  
HELD AT  
MONTPELIER, NOVEMBER, 1872.

PRESENT :

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. JAMES BARRETT, HON. ASAHEL PECK, HON. HOYT H. WHEELER, HON. HOMER E. ROYCE, HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS,	} ASSISTANT JUDGES.
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FRANCES E. DICKINSON *v.* THE TOWN OF ROCKINGHAM.

*Highway.*

A highway was rendered impassable by a freshet. One of the selectmen, pursuant to a previous understanding among the selectmen that each should take charge of the matters pertaining to the duties of the office in their respective parts of the town, and that what each did should be concurred in by the others, placed a barrier across the highway for the purpose of preventing travelers from passing over it while thus out of repair, and of turning the travel, for the time being, and until the highway was repaired, around the southerly portion of the highway, over a hill road, which was a private way, not adopted by the town.

*Held*, that this constituted a temporary adoption of the private way as a substitute for the highway while not in condition for use, and that the town thereby became liable for damage occasioned by reason of the insufficiency and want of repair of said private way.

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Dickinson v. Rockingham.

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*Held*, also, that, when said private way thus became a substitute for the highway, it became such for all travelers, as well those who had occasion to use it in going to and from houses situate thereon, as those who used it to pass around the foundering portion of the highway. WHEELER and ROYCE, J. J., dissenting.

CASE for injury caused by the insufficiency of a highway. Plea, not guilty, and trial by jury, April term, 1871, Windham County, BARRETT, J., presiding.

The injury occurred on the evening of the 5th of November, 1869, near Saxtons River village. A public highway and important thoroughfare has for many years existed between said village and Grafton, which the defendant was bound to maintain. In the October freshet of 1869, a piece of that highway in the westerly part of said village, was washed out, and rendered wholly impassable. While it was thus impassable, the travel between Grafton and said village passed over a hill road, shown on a plan that was proved and used on the trial. The injury to the plaintiff occurred on said hill road. There was no other road besides these two, from said village to Grafton. The plaintiff gave evidence tending to show that said hill road was, and had been for many years, a public highway. The defendant gave evidence tending to show it was always a private way, and not a public highway. On this point, the case was submitted to the jury without exception. The plaintiff claimed, and gave evidence to show, that, if not a public highway previous to said freshet, it became so on the main road being washed out by the freshet, by the action of the selectmen in relation thereto, and so continued when the plaintiff was injured upon it. The defendant claimed, and gave evidence to show, the contrary. This was the main point of controversy in the trial. On this subject, the plaintiff's evidence tended to show acts on the part of one of the selectmen,—Willard, —who lived in said village, in accordance with a previous understanding among the selectmen as to each taking charge, and doing what he thought best, in matters proper for the selectmen to attend to, in the parts of the town in which each respectively lived—they living in different parts of the town, and remote from each other—and claimed that such acts were of the same effect as if done with the present concurrence of all the selectmen. The plaintiff also gave evidence on this subject tending to show a sub-

sequent ratification by the other selectmen, of what had been done by the one living in said village. The defendant gave evidence tending to show the contrary, and that what Willard said, or did, which the plaintiff claimed made the town liable in respect to the hill road, was said and done by him alone, and not in accordance with any previous understanding with the other selectmen, and was not subsequently ratified by them. The details of the evidence upon this subject are sufficiently indicated by the part of the charge under which the subject was submitted to the jury, which was—that though the hill road, up to the time Willard directed the ladder to be placed across the lower road, was a private way, and had not been adopted by the town; yet, if they found that Willard, when he directed the ladder to be put across the lower road, not only intended to prevent travelers from going over the lower road while thus out of repair, but also intended to turn the travel over the hill road for the time being, and until the lower road was put in repair; this would constitute a temporary adoption of the hill road as a substitute for the lower road while not in condition to be used, provided the jury should also find that this act of Willard was concurred in by his associate selectmen: that if so adopted by the selectmen, the town would be responsible for its insufficiency and want of repair; that in order to constitute such concurrence by his associates, it was not necessary that they should have been personally present, or have had knowledge of what was done at the time, or of the specific act to be done; that if there was an understanding between the selectmen that each should take charge of the matters pertaining to the duties of the office in their respective parts of the town, and that what each did should be concurred in by the others, whatever was done by Willard in causing the ladder to be put across the road, as shown by the evidence, should be treated as done in pursuance of such understanding, and with the concurrence of his associates. To this part of the charge, the defendant excepted.

Early in the evening of the injury, the plaintiff went from her home to said village, about a mile and a half, with a man named Lawrence, who was carrying grain to a mill to be ground that

evening. Her purpose in thus going was to get some medicine of Dr. Campbell, whose house is shown on said plan, and then to go to the Wiley house, also shown on said plan, to visit her aunt while the grain was being ground, and when ground, Lawrence was to call at her aunt's and carry her back home. She went to said places according to her purpose, and Lawrence called and took her into his wagon at her aunt's, approaching the house from the east, and started from the house, westwardly, on said hill road, on his way home. Neither the plaintiff nor Lawrence would have used the main, or lower, road, that evening, for any of their respective purposes, and they would have gone upon and used said hill road just as they did for the purposes of the plaintiff as aforesaid, if said lower road had not been injured by the freshet, and had been in perfect condition for all kinds of travel, and unobstructed; in other words, the plaintiff went on the hill road, only to visit her aunt, and Lawrence went there to get her and carry her home; but for that, he would not have gone on to that road; and he would have done just as he did, if the lower road had been in perfect condition for use, and unobstructed, and would not have used said lower road at all, between the termini of said hill road.

The defendant specially requested the court to charge the jury, that, if, up to the time of the freshet, the hill road was not a public highway, which the town was bound to maintain, and if what was done by Willard in putting the ladder across the lower road constituted a temporary adoption of the hill road as a substitute for the other, while being repaired, that such temporary adoption would be for the purpose, only, of persons using the hill road as a way around the washout, and in lieu of the main or lower road, and that as to persons going to and from the "Newton" and "Wiley" houses, and using this road for that purpose, it must be treated as a private way, and its character unaffected by the temporary adoption in this respect; and if the jury found that the plaintiff, in pursuance of a purpose she had at the time she left Milton W. Wiley's with Lawrence, was using this road for the purpose of a visit at, or a return from, the "Wiley house," she could not recover.

The court, *pro forma*, refused to charge as requested, but charged, in substance, that if the road was temporarily adopted in the manner above set forth, as a way around the washout while the main road was disabled, the rights of the plaintiff would be the same, as against the town, if she used it for the purpose of going to or from Wiley's, as though she used it as a way around the washout—that there was no distinction between the two kinds of travel. To this part of the charge, and the refusal to charge as requested, the defendant excepted.

In every other respect, upon all points and aspects of the case, the court charged fully, and to the satisfaction of both parties; and the exceptions taken, in no manner involve any omission to charge in respect to the subjects of said exceptions, but for the error in the charge as above set forth, it being correct and full in every other respect. Verdict for the plaintiff.

———, for the defendant.

During the freshet of October, 1869, a portion of the public highway was washed away, so as to be impassable and dangerous. The point where it was washed away, was between the easterly and westerly junctions of the hill road with the main road. Willard, one of the selectmen, caused a ladder to be placed across the main road, as shown by the plan, near its junction with the hill road. The plaintiff claimed that by this sole act of Willard, the hill road, though a private way up to this time, became, for the time the main road was being repaired, a public highway; that it was a temporary adoption of the hill road, as a substitute for the main road, while being repaired. The plaintiff also claimed that this act of Willard could be treated as concurred in by his associates, by reason of a previous understanding between the selectmen that each should take charge of the matters pertaining to the duties of their office, in each of their respective parts of the town, and that what each did should be concurred in by the others.

The charge of the court upon this feature of the case, was to the full extent of the plaintiff's claim, as above set forth. The

defendant complains of the charge in this respect, for two reasons:

*First.* The charge did not properly restrain the jury from finding Willard's intention to turn the travel over the hill road, from the mere act of placing the ladder across the lower road. The charge is based on the proposition that it is legitimate to infer the intention from the act alone.

*Second.* We complain of the charge, because it assumes that "a previous understanding between the selectmen, that each should take charge of the matters pertaining to the duties of their office in their respective parts of the town, and that what each did should be concurred in by the others," is quite sufficient to enable Willard, without the knowledge of his associates, to create a public highway where one never existed before; and we complain because the jury were not instructed that it was necessary that they should find that Willard's associates concurred in his intention as well as in his act.

In relation to the first ground of objection to the charge, we say: It was the duty of the town to warn travelers of the danger to life and limb, that would be incurred in passing over the main road. This is usually, and very properly, done by placing a barrier across the disabled road, as done by Willard in this case. The barrier erected by him spoke clearly and unmistakably in this direction. Nothing more was done than necessary for this purpose. Nothing was left undone that could have been done, to characterize the purpose for which it was done. Nothing more, and nothing less, was done, than would have been if there had been no private road near there. The private way happened to be near where the public way happened to be washed away. The town was not responsible for the nearness of the private way to the locality of the washout. *Sherman on Neg.* §376.

The hill road, being an open private way to the "Newton and Wiley houses," Willard had no right to interfere with it, or the travel over it. He was bound to let it remain as he found it, an open private way. *Page v. Weathersfield*, 13 Vt. 424.

The exceptions state that the "details of the evidence are sufficiently indicated by the part of the charge under which the sub-



ject was submitted to the jury," and this is the part of which we now complain. The sum total of the evidence detailed—and all there was upon this point is given in the charge—is the mere act of Willard in placing the ladder across the public or main road. Add to this mere act the fact of the nearness of the hill road to the locality of the washout, and we have all there was in the case upon which to base a finding of an intention on the part of Willard to turn the travel over the hill road.

This act of Willard, speaking clearly and unmistakably in another direction, does not afford legitimate and sufficient evidence of an intention to turn the travel over the private way. The jury should have been instructed that they were not at liberty to find such an intention from an equivocal act, speaking in another direction—from an act which it was the duty of the town to perform for another purpose. *Blodgett v. Royalton*, 17 Vt. 40.

The second ground of complaint against this part of the charge, is, that it assumes that the general understanding between the selectmen was intended to be pushed so far as to apply to the creation of public highways. Such a construction is unreasonable and dangerous. The jury were, by the charge, compelled to give this construction to the "general understanding." The court told the jury, without qualification, and as matter of law, "that if there was an understanding between the selectmen, that each should take charge of the matter pertaining to the duties of the office in their respective parts of the town, and that what each did should be concurred in by the others, whatever was done by Willard in putting the ladder across the road, as shown by the evidence, should be treated as done in pursuance of such understanding, and with the concurrence of his associates." The court also instructed the jury, "that if they found that Willard, when he directed the ladder to be put across the lower road, not only intended to prevent travelers from going over the lower road, while thus out of repair, but also intended to turn the travel over the hill road for the time being, and until the lower road was put in repair, this would constitute a temporary adoption of the hill road as a substitute for the lower road while not

in condition to be used." It was as necessary that Willard's associates should concur in the purpose for which the act was done, as in the act itself. And if Willard had a double purpose, they should have concurred in the double purpose.

A public highway cannot be created by adoption, unless there has first been a dedication by the owner of the fee. The case at bar shows no dedication, or intention to dedicate; and the charge, as well as the evidence, is entirely barren of this element. *Page v. Weathersfield, supra; Blodgett v. Royalton, supra.*

Travelers may have had the right to travel the private way in the condition it then was, because of the founderous condition of the public way, yet the town—in case there was no dedication—had no right to dig the soil, or in any way change the character of its surface, unless they obtained the right in the mode pointed out by the statute.

It is claimed that when the public way became impassable, it was the duty of the selectmen to change the location so as to give a safe passage, and that the statute has given selectmen power to do it. That they have power to do it, is unquestioned. Whether it is their duty or not, depends upon circumstances.

In this case, it was their duty to repair the public way. They had the power by statute to do it. Neglect to do so would have subjected them to an indictment. The case does not show that the town lacked in energy and diligence in putting the public way in repair. *Hyde v. Jamaica, 27 Vt. 443; Briggs v. Guilford, 8 Vt. 264.*

The cases of *Willard v. Newbury*, and *Batty v. Duxbury*, have no application to the one at bar. In each of these cases, the railroad corporation had, by its charter and the statutes, obtained the right to permanently construct its roadbed over and upon the highway, and it became permanently obstructed by the exercise of the corporation's lawful right. The town could not remove the obstructions; and the town's duty was to do the only thing that could be done—provide a new public way. Gen. Stat. ch. 28, §§ 34, 35, 36, 37; *Willard v. Newbury, 22 Vt. 458; Batty v. Duxbury, 24 Vt. 155; Hyde v. Jamaica, 27 Vt. 443.*

In *Willard v. Newbury*, the plaintiff was injured on the obstructed highway, and not a by-way. The town was held liable, because they did not maintain a barrier across the road as a warning of the danger.

In *Batty v. Duxbury*, the injury occurred on a by-way, made by the railroad company as a substitute for the public way. The by-way was insufficient. The town could never remove the railroad bed. It was a permanent obstruction. Their duty was to have a sufficient by-way, or substitute, and in this case one of the counts went upon this ground.

In the case at bar, the plaintiff's declaration describes a public highway leading from Saxtons River village to Grafton, and avers an injury to plaintiff in consequence of its insufficiency. There is no count going upon the ground of the neglect of a town to provide a suitable by-way.

In view of what the court charged upon the question of the temporary adoption of the private way as a substitute for the public way, while it was being repaired, the defendant was clearly entitled to have the jury instructed as specially requested. The part of the public way where the washout was, could not be used with the private way, for the purpose of going to and from the "Newton and Wiley houses."

The case shows that the plaintiff's purpose when she left home, was, to first go to Dr. Campbell's, and then to the "Wiley house," to visit her aunt, and that she did so; that in pursuance of an arrangement she had with Lawrence when she left home, he called for her in the evening, at the "Wiley house," and that the plaintiff was injured on the private or hill road, on their return home. Whether the public way had been in repair or not, they would not, and could not, have used it. There was no way she could have gone to her aunt's and returned to Milton W. Wiley's, but to use the hill road just as she did. She was not in the use of the hill road as a substitute for the main road while it was being repaired.

The case shows that the town, in the line of its duty, decided to repair the main road, and did so. If we assume that it was its duty, while doing this, to provide a suitable way around the

washout, for the travel that might, and would, go over that part of the public way, if in repair, we assume quite enough. The town was not called upon to make a better private way for the occupants of the "Newton and Wiley houses," and for persons using it to go there on visits, or business.

The private way was in the condition its owners chose to have it, and as they had used it for years. What had occurred that cast upon the town the burden of making it better for their purposes? If one of the occupants of these houses, after the freshet, had been injured upon the hill road, while using it as they had done theretofore, would the town be liable for the injury? We think not. As to them it was still their private way. Persons who used the hill road, not as a substitute for the main road, but as a way to or from the "Newton and Wiley houses," could have no greater rights against the town than the owners or occupants of these houses.

We do not admit that the hill road became a *highway*, or a portion of the public highway, within the legal signification of that term. If the town had made and opened it to travel, to be used only while the main road was being repaired, it would not have been a *highway*, but merely an open public way for the time being, what is termed a by-way. When the main road was repaired, it ceased to be a public way, or by-way, without any action on the part of the town authorities. *Batty v. Duxbury*, *supra*.

The case of *Brown v. Winooski Turnpike Co.* 23 Vt. 104, is claimed by plaintiff to be identical in principle with the one at bar. It is cited as an authority for the plaintiff's claim, that it makes no difference for what purpose the hill road was used. The case is widely different from the one at bar, and does not sustain the plaintiff's proposition.

The charter of the turnpike company gave the right to recover damages of the company, only to those of whom toll was demandable. The only question in the case was, whether the defendant was a person of whom toll was demandable by the terms of the charter. It was held that toll was demandable of the plaintiff, and the defendant therefore liable by express terms of

the charter. *Tisdale v. Norton*, 8 Met. 392; *Shepardson v. Coleraine*, 13 Met. 55; *Smith v. Wendell*, 7 Cush. 498; *Kellogg v. Northampton*, 4 Gray, 69.

*Chas. N. & S. T. Davenport*, for the plaintiff.

It was the duty of Rockingham to keep this great thoroughfare "in good and sufficient repair at all seasons of the year." Gen. Stat. ch. 25, § 1. And if any portion of it was rendered impassable, it was the duty of the selectmen to change the location of the highway, so as to afford the traveler a safe passage. And the statute has given the selectmen the power and the means to perform this duty. Gen. Stat. ch. 24, § 24.

In *Willard v. Newbury*, 22 Vt. 458, the court say: "We think that the town was bound, during the interruption of the travel by the construction of the railroad, to see that a suitable by-way was provided for the public, and to take all reasonable and proper precautions to guard them against passing upon the highway, while it remained unsafe by reason of the operations of the railroad company in the construction of their road." And in the subsequent case of *Batty v. Duxbury*, 24 Vt. 155, which was an action to recover damages for an injury happening upon a by-way which the Vermont Central railroad had constructed around an obstruction which they had necessarily created in the construction of their railroad, and which, in the language of the case, furnished "no evidence that the town had ever recognized said new way, or done any act in connection therewith to adopt it, but the contrary did expressly appear," the court held the plaintiff entitled to recover. And REDFIELD, J. says: "We think it must now be regarded as settled law in this state, that the primary obligation rests upon towns to see that the public have a proper by-way to pass around the obstruction," and that, though it may be doubtful whether such a by-way can be regarded as a portion of the *highway*, yet, "it is an open public way for the time being, and, as such, required to be kept in a certain state of repair." And again: "The traveler is not bound to inquire who makes by-ways, or by what authority obstructions are put upon highways. But towns, after having reasonable notice of the existence of obstruc-

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tions in their highways, are bound to remove them, or make safe by-ways to pass around them, or see to it that they are properly made by others, in order to exonerate themselves from liability to those who have occasion to travel." See also opinion of Ch. J. REDFIELD in *Hyde v. Jamaica*, 27 Vt. 468; *Barber v. Essex*, Ib.; *Briggs v. Guilford*, 8 Vt. 264; *Matthews v. Winoski Turnpike Co.* 24 Vt. 480. These cases are full authority for the plaintiff's right to recover, without the element of the selectmen's action in fencing up the lower road, and thereby turning the travel over the hill road. The undisputed facts in this case make a much stronger one for plaintiff than either *Willard v. Newbury*, or *Batty v. Duxbury*.

This hill road, if not a way which the defendant was bound to keep in repair up to the time the selectman Willard fenced up the lower road, and left no other avenue of travel, became by this act of Willard, accompanied by the intention which the jury have found he had to turn the travel over the hill for the time being, and till the lower road was put in repair, a highway which the defendant was bound to keep in repair, so long, at least, as it was used as a substitute for the lower road. The case at bar is one where there had been an open public way for a period of more than fifty years, and though the evidence did not show many acts of the town recognizing it as a highway, yet the public had used it "for a time whereof the memory of man runneth not to the contrary." Conceding that this road had not become a public highway by *prescription* (as we think upon principle and authority it had), it is certain that, from this long user, a *dedication* to the public by the land owners would be presumed, and very slight acts by the town, or its agents, would constitute an acceptance or adoption of this highway.

In *Blodgett v. Royalton*, 14 Vt. 294, WILLIAMS, CH. J. says: "If the town, or the selectmen as their agents, shut up an old road, and leave no other avenue for travel, except on a road which they have caused to be made, or if they put the same into a rate bill, &c., the town would be liable to the traveler for the insufficiency of such road." And see *Blodgett v. Royalton*, 17 Vt. 40; *Hyde v. Jamaica*, *supra*; *Morse v. Ranno*, 32 Vt. 600; *Folsom*

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v. *Underhill*, 36 Vt. 580; *Bagley v. Ludlow*, 41 Vt. 431-2; Angell Highways, § 143-157 *et seq*; *Whitney v. Essex*, 42 Vt. 520. In *Holbs v. Lowell*, 19 Pick. 405, the court held: "That a town by forbearing to prosecute those who had shut up an old highway, and substituted a new one in its stead, and by setting up a guide post in the new way, had adopted it, so as to be liable for its insufficiency." *Stevens v. Nashua*, 46 N. H. 192.

It may be said that the town is not bound by the act of Willard, because he was but one of a board of three selectmen. To this objection we answer—this is not one of those acts which require the express assent or concurrence of a majority of the selectmen. When an emergency arises like the one which made it necessary for the selectmen to act in this case, it is sufficient when one of the board does acts that are reasonable and necessary, if the other members do not disapprove and disavow those acts when they come to their knowledge. But the jury have found that this act was concurred in by his associate selectmen, and that it was done pursuant to an understanding among the board, that each should take charge of the matters pertaining to their duties in their respective parts of the town, and that what each did should be concurred in by the others. *Tarbell v. Plymouth*, 39 Vt. 429; *Hills v. Marlboro*, 40 Vt. 648; *Haven v. Ludlow*, 41 Vt. 418; *Bellows v. Weeks*, Ib. 590; *James v. Starksboro*, 42 Vt. 602.

The defendant was not entitled to have its special request answered; and the charge of the court upon this subject was right. There is no such thing known to the law of Vermont, as a hihgway for *one* citizen which is not a highway for *all*. If this hill road was a highway at the time of the accident, the defendant is liable; if not a highway, the defendant is not liable. And for the purposes of this case, that is the only test. "A highway is a public road which every citizen has a right to use." Every thoroughfare which is used by the public, and is, in the language of the common law, "common to all the king's subjects," is a highway, whether it be a foot-way, carriage-way, or a navigable river. 3 Kent Com. 432; Angell Highways, § 2; *State v. Wilkinson*, 2 Vt. 487; Sher. & Redf. on Negl. § 343. And when a highway is established in a town, whether by proceedings under

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the statute, by dedication and adoption, or by prescription, it becomes the duty of the town to keep that highway in good and sufficient repair at all times and seasons. Sher. & Redf. on Negl. §414. And it is no concern of the town, what motive brings the traveler upon its highway, or what his business may be, provided, perhaps, that it be not unlawful. It is sufficient that he be a traveler, using the road for the purpose of travel.

It seems to us that the case of *Brown v. Winoski Turnpike Co.* 23 Vt. 104, is, in principle, identical with the one at bar.

The opinion of the court was delivered by

Ross, J. Under the instructions of the county court, the jury have found that when Willard, one of the selectmen of the defendant town, directed the ladder to be placed across the main road, near the junction of the hill road with the main road, he intended thereby, not only to obstruct the main road so that travelers would not pass over that portion of it which was out of repair, but, also, to turn the travel over the hill road; and that he did this agreeably to an understanding which existed between him and the other selectmen, that each one should take charge of the matters pertaining to the duties of their office in his part of the town, and that the others would concur in whatever he did in that behalf. The court treated the hill road as a private way for the sole use of three or four families that lived upon it, up to the time Willard directed the ladder to be placed across the main road, but told the jury, if they found he intended to turn the travel over the hill road while the main road should be out of repair, when he directed the ladder placed across the main road, and he directed the ladder placed there agreeably to a previous understanding with the other selectmen, this would constitute a temporary adoption of the hill road as a substitute for the lower road while not in a condition to be used. The defendant complains of this instruction, because he claims that it did not restrain the jury from finding Willard's intention to turn the travel over the hill road, from the mere act of placing the ladder across the lower road; and because it assumes that such a previous understanding between Willard and his associates, was



sufficient to enable Willard, without the knowledge of his associates, to create a public highway where one had not before existed ; and because the instructions rendered it unnecessary for Willard's associates to concur in his intention, as well as in his act. The ladder was placed across the main road just easterly of the westerly junction of the two roads. The hill road ran nearly parallel with the main road, and there was no fence between them. The ladder, from its position in regard to the two roads, would naturally and inevitably, not only obstruct the further passage of the traveler on the main road, but also turn him over the hill road. To the traveler desirous of passing eastward, it would speak as distinctly in the one direction as the other ; and of this, Mr. Willard, as a prudent man, must have been aware when he directed the ladder placed there. We know of no reason why a town officer should be exempt from the rule which so extensively obtains in the law, that a man is presumed to intend the natural consequences of his acts. Under this rule, Willard's act, in the absence of any warning to the traveler to the contrary, tended to show that he intended to turn the travel over the hill road, while the main road was out of repair. The traveler's condition would be a very unfortunate, not to say hard, one, if, upon finding the main road obstructed, with another road running nearly parallel with it, leading from it just before reaching the obstruction, he must go out on a search to find the town officer placing the obstruction there, and inquire whether he intended thereby to turn him into a plain, open way, leading round the obstructed portion, before he could use it for a temporary highway which the town was bound to keep in repair. A town cannot be said to have fully discharged its duty to the traveler, when one of its main highways is washed away to an extent that it will take days or weeks to repair it, by simply placing an obstruction at the two ends of the washout, without providing a by-way to pass round it. The traveler would naturally expect to find such a by-way round such a spot, and seeing a by-way there, opened and in use, would have a right to conclude it was prepared by the town for his use. We think the court were right in allowing the jury to find, from his act in placing the ladder across the main

road at the place he did, with the hill road leading out of it near to and before reaching the ladder, that Willard intended to turn the travel over the hill road.

Nor do we think it necessary for all the selectmen to have been present, and joined in directing the placing of the ladder across the main road, and in intending thereby to turn the travel over the hill road, in order to make the hill road a highway for the sufficiency of which the town would be liable so long as the main road continued fenced up. Whenever a portion of a highway is swept away by a freshet, or rendered unsafe for travel from any cause, and that fact comes to the knowledge of one of the selectmen of the town, the statute imposes the duty upon him, at once to go about repairing it, and immediately to use effective means to prevent the traveler from passing over the unsafe portion of the highway, and if it is on one of the principal highways, and the making of the repairs must, of necessity, consume considerable time, it is his duty to provide a way round the foundered portion of the main highway, when it can be done without too great expense. It will not do for him to wait till he can call his associates together, and till they can all solemnly deliberate and determine what must be done. The statute imposes the duty of immediate action. It is imperative. The manner of performing the duty may require the exercise of judgment. It is not discretionary with him whether he will act or not. We think, without any previous arrangement between the selectmen, the town would have been bound by the acts of Willard alone. If Willard had not ordered the ladder placed across the main road, but had known of the washout, of the obstruction of the main road with the ladder, and that the travel was turned over the hill road, the town would have been liable for any injury happening to the traveler on the hill road, through its insufficiency. This was decided in *Batty v. Duxbury*, 24 Vt. 155, and has been followed and adopted in two decisions not yet reported: *Staples & wife v. Berlin*, in Washington county, and *Richmond & wife v. Woodstock*, in Windsor county. In this case the court did not go the full length of this doctrine, but only held the town liable for the insufficiency of a by-way round the obstructed highway, opened by one of its

selectmen acting under a general authority previously conferred by the other selectmen.

The court, against the defendant's request and exception, charged the jury that, if the hill road was temporarily adopted as a way round the washout, while the main road was disabled, the rights of the plaintiff would be the same as against the town, if she used it for the purpose of going to or from Wiley's, as though she used it as a way around the washout;—that there was no distinction between the two kinds of travel. In this, a majority of the court think there was no error; that when the hill road thus became a substitute for a portion of the main road, it became such for all travelers who had occasion to use it, whether to go to and from the Wiley house, or to pass around the washout. It became an open public way, which the town were in duty bound to maintain and keep in good and sufficient repair for such use as the town was temporarily putting it to, and this duty the town, by the force of the statute, were bound to discharge for the benefit of all persons who had occasion to use it for the purposes of travel. It was in effect, for the time being, so far as the traveler was concerned, a removal of the main highway from its former location to the location of the hill road which passed the Wiley house; and as to the plaintiff, who was, at the time of the injury complained of, in the legitimate use of it as a traveler, the liability of the town was the same it would have been if the plaintiff had received the same injury, from the same cause, on the main highway in its original location. It may be, and probably is, true, that the town had not, as against the owners of the land through which the hill road passed, the same rights it had as against the owners of the lands through which the main highway passed. Whether it had, or not, is not at all determinative of its liability to the traveler for its sufficiency. Neither is it necessary to decide whether the town would be liable to the owners of the hill road, as a private way, for any injury happening to them through its insufficiency, while in the use of it for their ordinary domestic purposes, unless the insufficiency was occasioned by the town's using it as a substitute for the main highway. We regard the question of the town's liability to the owners of the hill road as a

private way, as separate and distinct from the question at bar, and express no opinion upon what their rights might be. We only decide that, under the facts found by the jury, the hill road, for the time being, became a part of the main highway, which the town was under a duty to keep in good and sufficient repair for all persons who were using it for the purpose of public travel, and that the plaintiff was, at the time of the injury, in such use of it, though only using it to go to and from the Wiley house.

Judgment affirmed.

WHEELER, J., dissenting. So far as the decision made in this case holds that the defendant town would be liable to a traveler who was using the highway for the purposes of through travel, and was necessarily turned on to the by-way in order to prosecute his journey beyond the obstruction, there is no disagreement among the members of the court; but where the decision goes beyond that, and holds the defendant liable to the plaintiff, who was not turned on to the by-way at all on account of the obstruction in the highway, but who would have used the by-way, just as she did, if the highway had been in good condition and unobstructed, there is some disagreement.

That the turning of the through travel on to the by-way did not establish a highway over it, is very clear. *Young v. Wheelock*, 18 Vt. 493. No one of the selectmen alone, nor all of them together, could lay out a road there, nor anywhere else, except on application to them as a board of road commissioners, by proper petition of the requisite number of freeholders, according to the statute. The town would not be liable to a through traveler because the by-way had become in fact a highway, but only because the authorities of the town had taken it for the use of such traveler, as a substitute for the highway while obstructed, and had induced them to take it and use it as such a substitute. In *Batty v. Duxbury*, 24 Vt. 155, it was held as settled law, that it was the duty of towns when their highways were obstructed, to see that the public have a proper by-way "to pass around the obstructions;" but the case did not hold that such a by-way would become a highway for those using it for other purposes, and not

for passing around the obstruction. In *Staples v. Berlin*, not reported, the plaintiff was using the by-way to pass around an obstruction; so was the plaintiff in *Richmond v. Woodstock*, not yet reported. And in no case that has been cited or discovered, previous to this one, has it been held that by providing a by-way to enable travelers to pass around an obstruction, the town became liable to any one using the by-way for any other purpose. In this case, as it was left, the by-way was a private way to and from private houses. The town had borrowed it for the use of travelers who might have occasion to pass around the obstruction, but not for the use of any others. This left it a private way for the use of those going to and from the private houses, as much as it was before. It was not a public highway for those going to the private houses, and not along round the obstruction, any more than it was for the occupants of those houses in going from and returning to them. It would seem to be plain that these occupants would have no claim upon the town for any injury they might receive on account of the insufficiency of the by-way, for the injury would be occasioned by a defect in their own private way. And it seems to me to be nearly as clear, that a person going to, or returning from, the houses, would have no claim for such injury; for that injury would be occasioned by the use of what to him, for that use, was a private, and not a public, way. The plaintiff, as the case states, had been over the by-way to the Wiley house, and was returning from there when she was injured, and had no occasion to use the obstructed portion of the highway on either of these journeys. To her, the condition of the regular highway was of no importance, and the turning of through travel from it on to the by-way, had not, in any manner, affected her. The by-way was not a highway in fact, nor had it been taken for her use as such; nor had anything been done, by, or in behalf of, the defendant, that in any way injured her, or led her where she received injury. If the travel which was turned on to the by-way had made it more dangerous than it was before, and this had injured her, the case might merit different consideration; but nothing of this kind appears.

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As the case stood, it seems to me that the plaintiff showed no liability on the part of the defendant. I am requested by Judge ROYCE to state that he concurs in this opinion.

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A. R. & G. M. DUNCAN v. ALLEN STONE, APPELLANT.\*

*Trover. Conditional Sale. Officer. Damages.*

The plaintiffs sold and delivered a wagon to one M. for \$120, to be theirs till paid for. The defendant, as constable, attached the same as the property of M., on a writ in favor of P. & Co. against him. The wagon was stolen from the defendant within three days after the attachment, and never afterwards found. At the time of the attachment, \$60 of the purchase money remained unpaid. Soon after the attachment, the plaintiffs gave notice of their claim to the defendant, and to P. & Co., but no tender, or offer, of the amount unpaid, was ever made to the plaintiffs. Judgment was rendered against M. in said suit, and execution issued within thirty days. The value of the wagon at the time of the attachment, was \$95. Held, that the defendant was liable in trover for the full value of the wagon, and could not discharge himself by showing a loss thereof without his fault.

TROVER for a wagon. Plea, the general issue, with notice of special matter. Trial by jury, April term, 1871, Chittenden county, PIERPOINT, C. J., presiding.

It appeared from the testimony, and was not disputed, that in August, 1869, the plaintiffs sold and delivered the wagon in question to one McCarty, for \$120, to be paid in monthly installments of \$10, and that the wagon was to remain the property of the plaintiffs until fully paid for. It was conceded that the defendant was a constable of the town of Colchester in 1869 and 1870, and was authorized to serve the process hereafter mentioned; that on the last day of December, 1869, the defendant received for service, a writ of attachment in favor of J. H. Platt & Co. against said McCarty, and that on the same day he attached said wagon upon said writ, as the property of the said McCarty, and, by direction of Platt & Co., took possession thereof, and that within three days thereafter, said wagon was stolen from the defendant's

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\* The decision in this case was announced at the January term of the supreme court in Chittenden county, in 1873.

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possession, and had never since been found. It was also conceded that a judgment was obtained against McCarty in said suit, and an execution issued thereon within thirty days from the rendition thereof; that when the defendant attached the wagon, it was in the exclusive possession of McCarty, and had been since the purchase thereof; that McCarty had paid the plaintiffs \$60 towards the wagon, and that \$60 was still due; that when the plaintiffs learned of the attachment, they informed the defendant of the terms of their trade with McCarty, and of the amount then unpaid on the wagon, and forbade the defendant's taking the wagon, and told him they should hold him responsible for it if he took it. The attaching creditors were also informed of the plaintiffs' claim, within a day or two after the attachment. It was also conceded that no tender, or offer of the balance due on the wagon, had ever been made by the plaintiffs.

The defendant offered to show that after he attached and took possession of said wagon, he exercised in reference to its care, preservation, and safety, that degree of diligence and care which prudent men exercise in the care and management of their own property of a similar kind, according to the rule laid down in *Briggs v. Taylor*, 28 Vt. 180, and that the wagon was stolen from him without his omitting to exercise such care and diligence in its preservation and safety. But the court excluded the evidence; to which the defendant excepted.

The defendant then requested the court to rule that the defendant, if liable at all, was not liable in this form of action, but that the plaintiffs' remedy, if they had any, was by an action on the case for negligence; but the court refused so to rule, and, neither party wishing to go to the jury on the testimony, directed a verdict for the plaintiffs. To the refusal to rule as requested, and to directing a verdict for the plaintiffs, the defendant excepted.

It was conceded that the value of the wagon at the time of the attachment, was \$95, and that the interest thereon to the day of trial, was \$7.35.

The defendant requested the court to direct that the amount of damages which the plaintiffs were entitled to recover, if they were entitled to recover anything, was only the \$60 due on the wagon,

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and the interest thereon; but the court directed a verdict for \$102.35, the full value of the wagon at the time of the attachment, and interest thereon; to all which the defendant excepted.

*Henry Ballard*, for the defendant.

I. The evidence offered as to the manner in which the defendant had kept the wagon until it was stolen, should have been admitted, as it had a tendency to establish a defense. In cases of ordinary attachments, the attaching officer is bound to exercise only ordinary care and diligence in regard to the property attached. *Briggs v. Taylor*, 28 Vt. 181; *Bridges v. Perry*, 14 Vt. 262; *Sher. & Redf. on Negl.* 609-10. Under the Gen. Stat. ch. 33, §§ 28, 29, the defendant had the right to attach the wagon, and to hold it ten days after notice of the amount of the plaintiffs' claim. It was stolen from him before the ten days expired. Its loss, then, if the defendant exercised proper care in keeping it, was without the fault of any one.

II. No recovery can be had in this form of action, as the defendant, if liable at all, is only liable in an action on the case for negligence. There was no conversion by the defendant. He had a right to take the wagon in the first instance, and the loss of it by theft, can only be charged to him upon the ground that he failed to keep it with such care as the law required of him. In all such cases, the rule is well settled, that the remedy is by an action on the case. *Tinker v. Morrill et al.* 39 Vt. 477; *Nutt v. Wheeler*, 30 Vt. 436; *Abbott v. Kimball et al.* 19 Vt. 551.

Common carriers and inn-keepers are not liable in trover for goods lost or stolen through their negligence. *Bowling v. Nye*, 10 Cush. 416; *Ross v. Johnson et al.* 5 Burr. 2825.

Neither are attaching officers, in cases of ordinary attachments, liable in trover for negligence in not taking proper care of property attached; but the remedy is in case for the negligence. *Abbott v. Kimball*, and *Nutt v. Wheeler*, *supra*.

III. It cannot be held that the defendant, by reason of negligence in keeping the wagon, or by neglecting to pay the plaintiffs the amount of their claim, thereby became a trespasser *ab initio*, and so liable in trover. A person becomes a trespasser *ab*



*initio*, only by abuse of powers and rights conferred upon him by law ; and those acts of abuse must be of such a character as to be themselves trespasses, if not licensed by law. The *Six Carpenters'* case, 1 Smith Lead. Cas. 188 ; 1 Hill. on Torts, 116 ; *Gardner v. Campbell*, 15 Johns. 401 ; *Gates v. Lemsburd*, 20 Johns. 427 ; *Mills v. Martin*, 19 Johns. 7, 32 ; *Nutt v. Wheeler*, *supra*. Mere acts of nonfeasance, or of negligence, are not enough. *Abbott v. Kimball*, *supra* ; 1 Hill. on Torts, 116 ; 1 Swift's Dig. 528. There must be some positive wrong done by the defendant, which goes to show that the original taking was not for the purpose which the law recognizes, but for some other unjustifiable object. *Stoughton v. Mott*, 25 Vt. 668 ; *Six Carpenters'* case, *supra* ; *Steillard v. Sweet*, 11 Eng. Crim. Law, 279 ; *Stone v. Knapp*, 29 Vt. 501 ; *Hale v. Clark*, 19 Wend. 499.

IV. If the plaintiffs have any remedy by reason of not being paid the amount of their claim, it is against the attaching creditors, and not against the defendant. It was their duty to make such payment, not the duty of the defendant.

V. The verdict should have been only for the amount of the plaintiffs' unpaid claim. The plaintiffs' property in the wagon, after the attachment, was a special property in the nature of a lien ; and the rule in all such cases is well settled, that the measure of damages is the amount of the lien. Sedgw. Dam. 508 ; *Hickok v. Buck*, 22 Vt. 149 ; *Jarves v. Rogers*, 15 Mass. 389 ; *Spear v. Hillard*, 8 Wend. 445. The rule is the same in the case of a pledge. Sedgw. 508 ; Story Bailm. 327, 359.

*E. R. Hard and Start & Watson*, for the plaintiffs.

1. Trover is appropriate, if the plaintiffs have *any* right of action.

2. Independently of the statute, the taking of the wagon by the defendant was a conversion, and gave the plaintiffs an immediate right of action. The statute gives the creditors of a conditional vendee the right, not previously existing, to attach the vendee's interest in the property ; but to perfect such right, and give effect to the attachment, the attaching creditor must pay, or tender, to the vendor, the unpaid purchase money, within ten days

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after notice of the amount thereof remaining unpaid ; otherwise, the attachment wholly fails for want of completion.

This case does not belong to that class of cases in which it is held that acts lawful in themselves, done under an authority given by law, becomes unlawful by reason of subsequent occurrences ; but belongs to that class in which a party acting under authority given by law, fails to do that which is necessary to render acts already done by him, lawful. In both cases he is a trespasser *ab initio* ; in the former, because, *by his misconduct, he loses his justification ; in the latter, because, by his neglect, he never has one.* *Shorland v. Govett*, 5 B. & C. 485 ; *Lamb v. Day*, 8 Vt. 407 ; *Briggs v. Gleason*, 29 Vt. 78 ; *Moore v. Robbins*, 7 Vt. 363 ; *Bond v. Wilder*, 16 Vt. 393 ; *Blanchard v. Dow*, 32 Me. 557 ; *Fales v. Roberts*, 38 Vt. 503.

3. As the entire legal title of the wagon was in the plaintiffs, the defendant is liable for its full value. *Smith v. Foster*, 18 Vt. 182 ; *Brown v. Haynes*, 52 Me. 578 ; *Angier v. T. P. M. Co.* 1 Gray, 621.

The opinion of the court was delivered by

WHEELER, J. Before the statute of 1854, the delivery of property under such a contract of conditional sale as appears in this case, was a mere bailment, and carried no attachable interest in the property to the bailee. *West v. Bolton*, 4 Vt. 558 ; *Bigelow v. Huntley*, 8 Vt. 151 ; *Smith v. Foster*, 18 Vt. 182 ; *Buckmaster v. Smith*, 22 Vt. 203. A creditor of the bailee could not, by attachment, acquire any right to stand in his place and pay off the claim of the conditional vendor, and thus make the property attachable. *Buckmaster v. Smith*, before cited. If such creditor took the property by attachment, before default in payment even, the vendor had the right against the creditor and officer to resume possession of the property, notwithstanding the bailment. *Bigelow v. Huntley*, before cited. It follows that, if the creditor or officer did not yield to the claim of the vendor to possession, but converted the property, the vendor could maintain trover for this conversion. In such action, the defendant could not stand at all upon the rights of the bailee, and would be liable for the full value of the property, the same as any stranger.

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The statute authorized a creditor, by attachment of the property, to take the place of the bailee in respect to the property, and extinguish the right of the vendor to it, by making payment, or tender of payment, within the time provided by the statute. But it gave the attaching creditor no right to hold the property against the vendor, otherwise than by payment or tender, according to the provisions of the statute. *Heflin v. Bell*, 30 Vt. 134; *Fales v. Roberts*, 38 Vt. 503. Neither payment nor tender of payment having been made in this case, the justification of the defendant for taking the property failed, and the plaintiffs could maintain trover, as was held in *Heflin v. Bell*; or replevin, as was done in *Fales v. Roberts*. Up to the expiration of the time provided for making payment or tender, the defendant could have stood upon the rights of the bailee, and have satisfied the rights of the plaintiffs by paying or tendering the amount due them, and then could have discharged himself from liability to the conditional vendee by exercising the diligence, and proceeding with the duties, required of an attaching officer towards the defendant in the attachment.

But after default in that respect for the whole period provided, the defendant had lost the right to stand in the place of the conditional vendee as to payment, and stood as a mere stranger to the plaintiffs. In that position, he was a trespasser as to the plaintiffs, without any justification to stand upon; and he could not discharge himself by showing a loss of the property without his fault, but stood as a wrong-doer, liable for the property by reason of the unlawful taking, without regard for what became of it after he took it.

If the vendee had an attachable interest in the property, the defendant would have had the right to have held the property from the plaintiffs until default of payment, and the plaintiffs could not have maintained replevin, nor would mere detention have been a conversion till then. But, as appears from *Fales v. Roberts*, they could maintain replevin at any time after the taking, before default as well as after; and this shows the whole right of property to have been in the plaintiffs. If the plaintiffs had recovered the property by taking it from the defendant, by the

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yielding of the latter without action, or by replevin, they would have held it subject to the rights of the vendee as to acquiring it by making payment. What they recover in this action, they will hold in lieu of the property, subject to the same rights. The plaintiffs' having right of action, and having commenced an action for the taking by the defendant, the vendee could have no action in his own behalf against the defendant for the same taking, but has his remedy, by way of the liability of the plaintiffs over to him, after recovery by the plaintiffs. 2 Wms. Saund. 47 e; 1 Swift Dig. 581; Story Bailm. § 93, n. 2; *Heydon & Smith's* case, 13 Co. 67, 69; Bennett's Vt. Jus. 126.

The plaintiffs' right of recovery represents the interest of the vendees, as well as that of themselves, on account of the liability over, and these interests are the whole estate in the property; the plaintiffs, therefore, are entitled in this action to recover the full value of the property.

If the defendant would have avoided this full liability, he should have made payment or tender of the sum due the plaintiffs, as the statute gave him liberty to do.

This case has been twice argued without producing unanimity in the minds of the members of the court at either hearing; the views expressed are, however, assented to by a majority of the court.

Judgment affirmed.

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ANDREW GIBBS v. BURR BENJAMIN.

*Sale. Statute of Frauds.*

When any thing remains to be done by either, or both, the parties to a contract of sale, before delivery, the title does not pass.

So inflexible is this rule, that when the property has been delivered, if any thing remains to be done by the terms of the contract before the sale is complete, the title to the property still remains in the vendor. The contract must be *executed*, to effect a complete sale.

The mere delivery of goods to the vendee is not sufficient to take a case out of the statute of frauds; he must accept and receive them.

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**BOOK ACCOUNT.** The facts reported by the auditor sufficiently appear in the opinion of the court. The court, at the March term; 1871, Rutland county, WHEELER, J., presiding, rendered judgment on the report for the plaintiff for the price of the wood sued for. Exceptions by the defendant.

*Joseph Potter and Edgerton & Nicholson*, for the defendant.

The *aggregatio mentium* necessary to constitute a contract, is wanting in this case. 4 Wheat. 228; 6 Wend. 108; *Vassor v. Comp.*, 11 N. Y. 449; *Trevor v. Wood*, 36 Ib. 307; *Beabin v. Hyde*, 32 Ib. 519.

There was no agreement, because the minds of the parties could not meet till the quantity, price, &c., had been presented to each mind. The price depended upon the quantity, not yet ascertained. "If anything remains to be done, such as weighing, measuring, counting, and the like, the right of property does not attach in the buyer." *Murphy v. Hawthorn*, 8 N. Y. 291; *Hanson v. Meyer*, 6 East, 614; 1 Parsons Cont. § 4; 2 Kent Com. 495; *Whitehouse v. Frost et als.* 12 East, 614; 5 Denio, 379; 2 Hill, 137; Long on Sales, 267 *et seq.*; *Andrew v. Dietrich*, 14 Wend. 14; 15 Ib. 221.

The contract, if all its terms had been ascertained and assented to, was within the statute of frauds. To constitute a delivery and acceptance of goods such as the statute requires, something more than mere words is necessary. There must be in addition, acts of the parties amounting to a transfer of the possession and acceptance by the buyer. 32 N. Y. 519; 40 Ib. 519; 47 Ib. 449; *Shinn v. Houston*, 1 Comst. 162; *Ely v. Ormsby*, 12 Barb. 570; ——— v. *Phillips*, 14 M. & W. 277; *Phillips v. Bistolli*, 2 B. & C. 511; *Nicholle v. Plume*, 1 C. & P. 272; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter et al. v. Toussaint*, 5 Ib. 855; 32 N. H. 49, 55; *Edgerton v. Hodge*, 41 Vt. 676; 25 Ga. 215; *Luey v. McNeil*, 58 Barb. 241; Chit. Cont. 390.

The question of acceptance is one of fact; and no acceptance being found by the auditor, the plaintiff cannot recover. 32 N. H. 56-7.

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*R. C. Abell*, for the plaintiff.

The auditor finds that the parties made a bargain, and states the terms thereof, which show that nothing further was to be done by the plaintiff, and that the delivery of the wood was complete. *Leonard v. Davis*, 1 Black, 483; *Evarts v. Butler*, Brayt. 216; *Hunt v. Thurman et al.* 15 Vt. 336, 343; *Bemis v. Morrill*, 38 Vt. 153, 155; *Fitch v. Burke*, Ib. 683, 688; *Scott v. Wells*, 6 Watts & S. 368; *Barrett v. Goddard*, 3 Mason, 112; *Gilmore v. Supple*, 11 Moore P. C., reported in 7 Am. L. Reg. (old series) 246; *Hanson v. Meyer*, 6 East, 614; *Parker v. Wallis*, 5 E. & B. 29; *Morton v. Tibbets*, 15 A. & E., N. S., 428, 440; *Bushell v. Wheeler*, Ib. 442; *Bradley v. Wheeler*, 44 N. Y. 502.

There was such an acceptance of the wood by the defendant, as to take the case out of the statute of frauds. *Shineller v. Houston*, *supra*; *Chappell v. Marvin*, 2 Aik. 79; *Browne* Frauds, §§ 320-1-2; *Boynnton v. Veazie*, 24 Me. 286; *Chaplin v. Rogers*, 1 East, 192; *Spencer v. Hale*, 30 Vt. 314, 317; *Whitwer v. Wyer*, 11 Mass. 6; *Marsh v. Hyde*, 3 Gray, 333; *Simmons v. Humble*, 106 E. C. L. 261; 3 Parsons Cont. 44; *Hilliard Sales*, 222.

When the quantity of the thing sold is agreed to be ascertained by count, weight, or measure, and there is an error in the count, weight, or measure, such error must be the proper subject for correction. *White v. Miller*, 22 Vt. 380, 387.

The opinion of the court was delivered by

REDFIELD, J. This action is book account to recover the price of cord wood alleged by the plaintiff to have been sold the defendant in April, 1869. Most of the wood was piled on the margin of Lake Champlain, on plaintiff's farm, in Benson, in this state. Two small parcels of the wood were on the opposite shore of the lake. About a week after the negotiation (which plaintiff claims was a sale), the wood was carried away by the flood of the lake, and lost. The report of the auditor gives a minute detail of every incident of the negotiation, and submits them to the court to interpret their legal effect.

The parties met at the instance of the plaintiff, and inspected the wood ; after some discussion, it was agreed that the defendant should purchase the wood at \$3.50 per cord, the defendant insisting that a portion of it was less than four feet in length, and that some abatement should be made for such deficiency ; to which the plaintiff did not assent. It was a part of the agreement, that the parties should meet and measure the wood, and accordingly, on the 19th day of April, 1869, they proceeded to measure the several piles of wood, each taking memoranda of the measurement as it proceeded. The defendant measured the *length*, and still claimed some abatement therefor. The plaintiff insisted that by the terms of the agreement, the wood was to be assumed to be four feet in length. " As it was getting dark when the measurement was completed, the parties went home, each with the figures for having a computation of the quantity of wood made therefrom"; and both parties expressed their inability to make the computation at the time. On the 21st of April, the defendant, with his son, went to the plaintiff's house, to see if they could agree about the quantity of wood that had been measured. The plaintiff had computed the quantity of wood at 204 cords and some feet ; " but, by mistake, had omitted one pile, containing some 60 cords." The defendant informed the plaintiff that he made the quantity 246 cords, after abating five inches for deficiency in the length of some portion of it, and proposed to the plaintiff that he would take the wood at 246 cords, as he made it, or at 204 cords, as computed by the plaintiff. The plaintiff replied that he might have it at 204 cords, and the defendant agreed to take it. After the defendant left, the plaintiff discovered the mistake, and immediately notified the defendant that he could not have the wood at 204 cords. The defendant sent back word that he would again meet the plaintiff, and did so in the afternoon of the same day. Plaintiff declined to let defendant have the wood at 204 cords, but consented to throw off 5 inches in length from two piles. Defendant refused to take the wood, except at 204 cords. The auditor has stated many other incidents ; but this is a substantial statement of the facts, as detailed by the auditor. It is not claimed that the two piles of wood across the lake were de-

*livered* to the defendant, either actually or constructively ; so the controversy is confined to the wood situate on the plaintiff's farm in Benson.

I. The defendant *agreed to purchase* all the wood piled on the plaintiff's farm on the margin of the lake, at \$3.50 per cord ; and if this comprised the whole case, it would be, in the language of Lord Brougham in the case of *Logan v. Lemesurier*, 6 Moore P. C., "Selling an ascertained chattel for an ascertainable sum" ; and by the rule of law applied to the sale of ponderous and bulky articles, such as wood, logs, coal, and the like, would effectually pass the property to the vendee. *Hutchins v. Gilchrist*, 23 Vt. 88 ; *Sanborn v. Kittredge*, 20 Ib. 639 ; *Birge et al. v. Edgerton*, 28 Vt. 291. But this case has other elements which impress upon it quite a different character. It was part of the *contract* that the parties should *measure the wood* and ascertain the quantity. They met for that purpose, and disagreed ; and that disagreement was as to the *substance* of the contract. The plaintiff insisted that it was agreed and part of the *contract*, that defendant should take the wood at "running measure" ; the defendant claimed that he purchased solid cords ; and that issue grew into controversy, but was never settled. The report does not state when the price was to be paid ; but in the absence of any special agreement, it is to be assumed that it was to be paid on delivery.

The principle is well settled, and uniform in all the cases, that when any thing remains to be done by either, or both, parties, precedent to the delivery, the title does not pass. And so inflexible is the rule that, when the property has been delivered, if any thing remains to be done by the terms of the contract, before the sale is complete, the property still remains in the vendor. *Par-ker v. Mitchell*, 5 N. H. 165 ; *Ward v. Shaw*, 7 Wend. 404. The contract must be *executed*, to effect a completed sale, "and nothing further to be done to ascertain the quantity, quality, or value, of the property." BARRETT, J., in *Hutchins v. Gilchrist*, *supra*. "The general rule in relation to the sale of personal property, is, that if any thing remains to be done by the seller before delivery, no property passes to the vendee, even as between the parties." POLAND, J., in *Hale v. Huntley et al.* 21 Vt. 147 ; Chit.



Con. 396. This rule of law applied to the facts as reported in this case, retains the property in the wood in the plaintiff, and leaves the contract *executory*, and, as a sale, incomplete. The case of *Simmons v. Swift*, 5 B. & C. 857, is much like this, but much stronger in its facts. It was an action for the price of a stack of bark sold at £9 5s. per ton. After the sale, it was agreed between the parties that the bark should be weighed by two persons, each party to name one. Part of the bark was weighed and delivered; the residue was much injured by a flood, before it was delivered, and for that reason, the buyer refused to take it. The court held that the bark was to be weighed before delivery, to ascertain the price; and as that act had not been done, the property remained in the seller, and that he must bear the loss. This was not a case where a *portion* was sold to be measured or weighed from the bulk, which would have no *identity* until severed and set apart; but the whole stack was sold, and a portion weighed and delivered. The subject of the sale was "ascertained" and the price "ascertainable;" yet the weighing was a thing to be done before the property passed to the purchaser.

In case of the insolvency of the defendant, it could hardly be claimed that the wood became part of his assets. Or if attached by his creditor, such creditor could hardly show a color of right, as against the plaintiff.

The plaintiff's counsel seem much to rely on the case of *Gilmore v. Supple*, 11 Moore P. C., reported in 7 Am. Law Reg. (old series), 246. In that case, the plaintiff sold a raft of lumber for a fixed price per foot, with specification of the measurement of each log, made by a public officer appointed for that purpose under the law of Canada, amounting in the aggregate to 71,443 feet, "to be delivered at Indian Cove booms." The seller conveyed the raft to the place of delivery, made it fast to the booms, and notified the servant of the purchaser of the delivery, who took possession of the same. The judge charged the jury, that "if there was an actual delivery at the place, into the possession of defendant's servants, the plaintiff was entitled to recover." The jury found for the plaintiff. Mr. Justice CRESWELL, in delivering the judgment, reviews, approvingly, the English cases of

*Hanson v. Meyer*, 6 East, 614, *Rugg v. Minett*, 11 Ib. 210, and *Wallace v. Breeds*, 13 Ib. 522, and *Simmons v. Swift*, *ut supra*, and says: "If it appears that the seller is to do something to the goods sold on his own behalf, or if an act remains to be done by, or on behalf of, both parties, before the goods are delivered, the property is not changed." The learned judge then proceeds to show that the rule of law, well established by these cases, had no application to that case, and in conclusion says: "There was, therefore, nothing to be done by the seller on his own behalf; he had ascertained the whole price of the raft by the measurement previously made; he had conveyed the raft to Indian Cove, and, according to the finding of the jury, had delivered it there. Nor was there anything further to be done, in which both were to concur, as in *Simmons v. Swift*." The plaintiff recovered because the sale was completed by delivery, and nothing further remained to be done.

II. We think this case within the statute of frauds. Our statute is a substantial re-enactment of the 29 Charles II., and has received the same construction given to the English statute. *Spencer v. Hale*, 30 Vt. 314, was a book action for the price of a quantity of fence posts, inspected and purchased by defendant, to be delivered on the cars at Shaftsbury. The plaintiff delivered the posts on the cars furnished by defendant, at Shaftsbury, and they were conveyed to the defendant's residence in New York. The defendant claimed that he never "*accepted*" them. The case turned upon the effect of the statute of frauds. Chief Justice REDFIELD delivered the opinion of the court, holding that the reception of the posts on board the cars furnished by the purchaser, and the forwarding of them by the station-man, who, for that purpose, was his agent, was an *acceptance*; and in defining the rule for compliance with the statute of frauds, says: "It is undoubtedly true that the defendant, at the time and place, had a right to repudiate the posts after delivery. In other words, in order to perfect the case under the statute of frauds, something more is necessary than a mere *delivery* of the goods. In the language of the statute, the purchaser must '*accept and receive part of the goods.*'" Authorities might readily be multiplied, affirming the

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rule in substantially the same language ; but we recur to it as of acknowledged authority in our own courts. If we could hold in this case—considering the nature of the property sold—that there was a constructive *delivery* ; yet, under the statute of frauds, “ the purchaser had the right, at the time and place, to *repudiate the wood after delivery*.” And the auditor finds, distinctly, that the defendant, while the measurement was being done (an act provided for by the contract of sale), *refused* to take the wood upon the terms and conditions prescribed by the plaintiff ; and the plaintiff, as distinctly, *refused* to let him have the wood upon the terms exacted by the defendant. It is not important which party was in the wrong. It is enough that the purchaser *refused* to “ *accept* ” the wood, to render the sale invalid under the statute of frauds.

The judgment, therefore, of the county court is reversed, and judgment on the report for the defendant to recover his costs.

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WALTER W. HUNKINS v. THE TOWN OF JOHNSON.

*Soldier's Bounty. Authority of Selectmen. Towns.*

Under an open offer, by vote of a town to pay bounties to those who enlist and are mustered into service to fill the quota of the town under a certain call, they who first accept the offer, and comply with its terms, in number sufficient to fill the quota, exhaust it; and the true date of muster, and not the date of the muster-roll, governs as to who seasonably comply with the offer, to entitle them to the bounty.

One selectman cannot bind the town by a contract made by him without the knowledge or consent of the other selectmen.

Neither can the town be bound by such contract by estoppel, any more than by the proper vigor of the contract itself.

**ASSUMPSIT** to recover a town bounty. Plea, the general issue, and trial by jury, December term, 1870, Lamoille county, REDFIELD, J. presiding.

The plaintiff offered in evidence a certified copy of the record of the warning of a town meeting, and of the proceedings of a meeting of the defendant town held thereunder on the 19th of December, 1868. The warning was :

"2d. To see whether the town will vote bounties to supply the quota of said town under the recent call of the president of the United States for 300,000 men to serve in the war.

"3d. In case the town shall vote to pay such bounties, to raise and provide means for the same."

The vote at said meeting was :

"That the selectmen be instructed to borrow a sum not exceeding \$3000, for the purpose of paying \$300 each to volunteers that may hereafter enlist for the war under the recent call of the president of the United States, including the one that it is understood has enlisted ; payment to be made to such enlisted men when mustered into the service of the United States.

"That the selectmen be authorized and instructed to raise a tax sufficient to meet one-third of the amount to be raised as aforesaid, to be raised on the list of 1863, and the remainder to be raised by tax in two equal installments, on the lists of 1864 and 1865 ; the first named tax to be raised in the month of January next."

The defendant objected to the admission of said copy of record, because the proceedings of said meeting were not warranted by the warning ; but the court overruled the objection, and admitted the same ; to which the defendant excepted. The plaintiff also introduced a certified copy from the records of the adjutant general's office, showing that the quota of the defendant under the call of October 17, 1863, was twenty men, and that at that date the defendant had a credit of twenty-four men for a surplus furnished under previous calls. The plaintiff also introduced a copy from said last named records, of town credits by name, from which it appeared that the plaintiff re-enlisted in Co. K, 8th Reg't, Vt. Volunteers, on the 5th of January, 1864, to the credit of the defendant, but that said credit was not received and entered on the books of the adjutant general's office till some time in April, 1864. The plaintiff introduced one John Mudgett as a witness, who testified that after the warning of said town meeting, but before the same was held, he had a conversation with Merriam, then one of the selectmen of the defendant town, in which Merriam said that a town meeting had been called, and that the town would undoubtedly vote a bounty of \$300 to fill the quota ; that experienced men were more serviceable to the government than raw recruits ;

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that they wanted recruits ; that he wanted the witness to write his son, who was then in the service, to have him, and others of his acquaintance, re-enlist ; that in accordance with such request, the witness wrote his son, and afterwards received a letter from him that he, and others, among whom was the plaintiff, had re-enlisted in the field ; that the witness communicated the contents of said letter to Merriam, and Merriam replied that he had heard of their re-enlistment before, and was glad of it ; that the date of this last conversation was about the middle of January, 1864, and might have been as late as the 20th ; and that he communicated to his son, Merriam's reply to this notice. The plaintiff also introduced one George E. Mudgett as a witness, who testified that he was a son of the said John Mudgett, and belonged to the same regiment as the plaintiff ; that he received a letter from his father, which was lost, wherein his father stated that he wrote at the request of Merriam, one of the selectmen of Johnson, that the warning for a town meeting was then up, and there was no doubt but the town would vote to pay a bounty of \$300 ; and that Merriam wanted the witness, and his friends, to help all they could, and re-enlist for their town ; that he communicated the contents of this letter to the plaintiff, and others ; that he received another letter from his father, stating that the town had voted a bounty of \$300, and that immediately after his, and the plaintiff's, re-enlistment, he wrote his father that he and the plaintiff, with others, had re-enlisted. The witness also testified that it must have been very near February when he got the last named letter from his father ; that he and the plaintiff came home on their veteran furlough in April, and while at home, they had a talk with Merriam and one Riddle, who was then one of the selectmen of the town. It appeared that at the time of this last named talk with Merriam, he was not one of the selectmen. The witness further testified that he and the plaintiff applied to Riddle for payment of their bounty, and Riddle told them the town was embarrassed for funds, but that they should each have \$300, the same as the town had paid the new recruits that had enlisted ; that they afterwards applied to Riddle for the money, and he told them they should have it, with interest, as soon as they returned. The plaintiff

testified that he re-enlisted in Co. K, 8th Reg't Vt. Volunteers, on the 5th of January, 1864, at New Iberia, La. ; that George E. Mudgett showed him a letter from his father, stating that the town was paying a bounty of \$300, and wanted them to re-enlist, and that he re-enlisted, relying upon, and expecting to receive, the bounty ; that he came home in April, and he and Mudgett had a conversation with said Riddle, in which Riddle said they were paying a bounty of \$300, and wanted them, and would pay them \$300 ; that the witness' captain, at his request, notified the town of his re-enlistment, but he did not know in what way he gave the notice. On cross-examination the plaintiff stated that he had no conversation or communication with either of the other selectmen relating to his claim for bounty. It appeared from the testimony on the part of the plaintiff, that the plaintiff's regiment was ready for muster on the 5th of January, but that, for want of a mustering officer, and without fault of the soldiers re-enlisting, the muster was delayed ; but that it was the understanding of the officers and soldiers that the muster-in should date back to the 5th of January ; and that the muster-in did take effect as of that date, accordingly ; and that the plaintiff was in actual service in his company, doing duty, and subjected to military control, from his re-enlistment to his muster. There was no evidence in the case tending to show that either Merriam, or Riddle, were authorized by the other selectmen to make any promises, or give any assurances in behalf of the town ; nor that what they did in the matter was by their authority, or with their consent, or had ever been communicated to them ; nor was there anything, except what might be inferred from their language above detailed, to show that either Merriam or Riddle was acting, or assuming to act, in their official capacity. It appeared from the testimony on the part of the defendant, and was conceded by the plaintiff, that the true date of the plaintiff's muster, was the 15th of March, 1864, but that it was to take effect as of January 5th, 1864. It also appeared that the plaintiff's original muster was February 18, 1863, and the term of his first enlistment, three years ; but that by a special order from the War Department, all soldiers of the 8th Vt. Reg't were permitted to re-enlist and be mustered on

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the 5th of January, 1864. It appeared from General Order No. 2, dated November 2, 1863, issued by the adjutant general of the state, and promulgated to the several towns the same month, that the defendant's quota under the call of October 17, 1863, was nothing; but that there was a deficiency under the draft, of ten men, and that the aggregate due from the town according to that order, was ten men. The defendant's quota February 1, 1864, under a call for 200,000 men, was ten, and the town was credited on the adjutant general's books, under date of February 27, 1864, "for result of draft in 1863," twelve men. Ten men enlisted to the credit of the defendant between the 11th of December, 1863, and the 1st of January, 1864; two of whom were mustered before the 5th of said January, and the others, on the 12th. Nine men re-enlisted into the 17th Reg't, and were mustered to the credit of the town on the 24th of February, 1864, and seven others enlisted into the same regiment and were mustered to the credit of the town on the 2d of March, 1864. It was conceded, that at the time of said town meeting, the town had been informed by the adjutant general of the state, and supposed, that their quota under the call of October 17, 1863, was ten men, and that they acted upon that supposition. After the close of the testimony, the court inquired of counsel whether any question was to be made of the fact that the plaintiff re-enlisted at the request, and upon the inducement, of said Merriam, in the manner stated by the plaintiff's witnesses; or that the plaintiff's actual muster-in was on the 15th of March, 1864, and that the delay was solely for the want of a mustering officer, and that, by arrangement with the military officers having charge of that matter, the muster-in was to, and did, take effect as of January 5, 1864. The counsel on both sides declining to go the jury on these, or any other facts in the case, the court directed a verdict for the plaintiff for \$300 and interest; to which the defendant excepted.

*M. O. Heath and Benton & Irish, for the defendant.*

*Brigham & Waterman, for the plaintiff.*

The opinion of the court was delivered by

BARRETT, J. It appeared, and it was conceded by plaintiff's counsel, that the plaintiff was in fact mustered in March 15th, 1864. By the terms of the vote, he could not be entitled to claim the bounty till he had been mustered in. So, in this respect, the dating back that event to the 5th of January on the muster-in roll, could not affect his right prior to the fact of muster-in to claim and have the bounty. Prior to that, the provision made by the vote of the town had been exhausted in paying men who had been mustered in and filled the quota provided for in the vote. In order to entitle a party to enforce an open offer, he must show that he has brought himself within the legal effect of such offer. In this case it was limited to ten men. Of course it would be exhausted by the ten men who should first accept and comply with its terms. The plaintiff failed, through no fault of the town, to be one of that number. He cannot maintain his action on that ground.

There is no occasion to discuss the question of the validity of that vote, that question having been settled in the case of *Mudgett v. Johnson*, 42 Vt. 423. Nor is there occasion to discuss any question of construction, for the limit and application of the vote are obvious on its face. In this respect the question is, whether plaintiff comes within the operation of it, by reason of having accepted the offer made by such vote.

The other ground of claim made in behalf of the plaintiff, cannot be maintained, for the record states that there was no evidence tending to show that either of the selectmen named by the plaintiff was authorized by the other selectmen to make any promises, or give any assurances, in behalf of the town, &c. This is the ground established by the evidence in *Mudgett v. Johnson*, on which, in that case, the plaintiff prevailed. There is nothing shown in this case from which any legitimate inference could be drawn, that any other of the selectmen were consenting to, or were cognizant of, what was being done by Merriam in respect to the enlistment of the plaintiff. This is matter of fact, necessary to be established by proof. The same is true as to Merriam's successor, Mr. Riddle.



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The case lacks essential elements in order to bind the town by *estoppel*. The town could no more be subjected to liability in this way, by virtue of what Merriam alone undertook to do, than by the proper vigor of a contract in that behalf, negotiated by him alone, in his office and character as selectman.

Judgment reversed and cause remanded.

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### MONTPELIER & WELLS RIVER RAILROAD COMPANY v. JAMES R. LANGDON.

#### *Subscription Paper. Estoppel.*

On the 19th of January, 1869, the defendant, a resident of Montpelier, subscribed for 100 shares of the capital stock of the plaintiff corporation, of \$100 each. At a legal meeting of the commissioners of said corporation, of whom the defendant was one, held December 20, 1869, the defendant, in presence of said commissioners, annexed the following written condition to his subscription: "Condition that good and responsible individuals in Montpelier subscribe fifty thousand dollars within one year from above date, and a list of subscribers, and amount of each, given me January 19, 1870." *Held*, that the true meaning of said condition was, that the amount of the defendant's subscription was to be counted towards the \$50,000 named therein.

At said meeting, after the condition was annexed as aforesaid, the defendant agreed that, if the plaintiff would procure \$40,000 of subscriptions from individuals in Montpelier, it should be a compliance with said condition; and thereupon said commissioners accepted the defendant's subscription, with said condition annexed thereto. The plaintiff thereafter, and before the time mentioned in said condition, relying upon the defendant's subscription and his said agreement, at great trouble and expense, procured from good and responsible individuals in Montpelier, subscriptions to the amount of \$40,700, besides the defendant's subscription, whereof the defendant was duly notified. *Held*, that the defendant was thereby estopped from claiming that by the terms of said condition the amount of his subscription was not embraced in said sum of \$50,000.

**ASSUMPSIT** upon a subscription to the capital stock of the plaintiff corporation, of which the following is a copy:

"MONTPELIER AND WELLS RIVER RAILROAD COMPANY.

"The state of Vermont having incorporated the Montpelier and Wells River Railroad Company, we the subscribers do severally agree with said corporation to take the number of shares of the capital stock of said company, of one hundred dollars each, placed against our names respectively, upon the following condition:

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"That no assessment, except five dollars per share paid at the time of subscription, shall be levied upon the shares, until twenty-five hundred shares shall have been subscribed.

Date.	Subscriber.	Shares.	Residence.
Jan. 19, 1869.	James R. Langdon,	100	Montpelier, Vt.

"Condition that good and responsible individuals in Montpelier subscribe fifty thousand dollars within one year from above date, and a list of subscribers, and amount of each, given me January 19, 1870."

Plea, the general issue, and notice. Trial by jury, September term, 1871, Washington county, PIERPOINT, Ch. J., presiding.

The plaintiff introduced in evidence the original subscription of the defendant, and also offered evidence tending to prove the due organization of the company, and that the defendant was one of the commissioners of the company, a resident citizen of Montpelier, and took an active part in said corporation; that at a legal meeting of the commissioners of the corporation, held at Montpelier, on the 26th day of December, 1868, said commissioners voted to open books for subscription to the capital stock of said corporation, and then and there appointed Roderick Richardson, and the defendant, and John A. Page, a committee to give legal notice of the opening of the books for subscriptions, to fix the times and places for opening said books, and to open said books and receive subscriptions, and to receive the five per cent. to be paid at the time of subscription; that said committee gave legal notice that said books would be opened for subscription at the two banks in Montpelier, and at other places on the line of the road, naming them, on the 11th day of January, 1869, and that said books would remain open ten days, Sundays excepted, and for such further time as the commissioners should direct; that the books were opened at both banks in Montpelier on said 11th day of January, and that the defendant, on the 19th day of said January, subscribed for 100 shares of the capital stock of said corporation, being the sum of ten thousand dollars, which subscription was accepted by the commissioners; that there was then no condition annexed to said subscription, except what appears above the name of the defendant; that afterwards, at a legal meeting of the com-

missioners held at Montpelier aforesaid on the 20th day of December, 1869, the defendant, then and there being one of said commissioners, and having in his possession the subscription book aforesaid, then and there, in the presence of said commissioners, and with their consent, annexed to his said subscription below his name, these words: "Condition that individuals in Montpelier subscribe fifty thousand dollars in one year from above date."

The rest of the condition on said book below the name of the defendant, the plaintiff claimed was put there without the consent of the plaintiff, which the plaintiff offered to prove; but the case turned on another point, which made this immaterial.

The plaintiff then offered to prove by parol that at the meeting last aforesaid, after said condition was annexed to the subscription, the commissioners inquired of the defendant whether the fifty thousand dollars named in said condition was to be \$50,000 not including the defendant's subscription, or whether the \$50,000 should include his subscription of ten thousand dollars; and that the defendant then said that he understood said condition to include his subscription of ten thousand dollars, to make up the \$50,000, and that the defendant then agreed that if the plaintiff would procure \$40,000 of subscriptions from individuals in Montpelier, it should be a compliance with the condition annexed to his subscription; and that on that agreement with the defendant, the commissioners then and there accepted said subscription of the defendant, with the condition annexed as aforesaid; that the plaintiff, relying on said subscription, and the statement and agreement of the defendant, canvassed the town of Montpelier, and on and before the 18th day of January, 1870, at great trouble and expense of time and money, procured from good and responsible individuals in Montpelier, subscriptions to the amount of \$40,700, without including the subscription of the defendant, and including the subscription of said defendant, to the amount of \$50,700, and that the defendant was duly notified of the same on the 19th day of January, 1870. All which testimony was objected to by the defendant, and excluded by the court; to which the plaintiff excepted.

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The court, on examination of the subscription of the defendant, ruled that unless the plaintiff could prove that \$50,000 were subscribed by individuals in Montpelier within said year, without counting the defendant's subscription, the condition to said subscription had not been complied with, and the plaintiff could not recover; and the plaintiff not claiming to prove subscriptions exceeding \$40,700 by individuals in Montpelier, without counting the defendant's subscription, the court ordered a verdict for the defendant; to which the plaintiff excepted.

The plaintiff offered testimony tending to prove all the material facts necessary for recovery, except as to the compliance of the plaintiff to raise the sum of fifty thousand dollars without including the subscription of the defendant, and the case turned on the construction given to the condition of said subscription, and the rejection of the testimony aforesaid, and the plaintiff did not claim to recover, if the said construction and rejection of parol testimony were correct.

*C. H. Heath, J. A. Wing, and P. Dillingham*, for the plaintiff.

The true meaning of the condition to the subscription of the defendant, is, that the fifty thousand dollars named in said condition should include the defendant's subscription of ten thousand dollars. If it is claimed that the \$50,000 should exclude the defendant's subscription, as the defendant was a citizen of Montpelier, there is sufficient doubt about the meaning so that parol evidence is proper to determine it. Esp. Dig. 787-8. In the construction of contracts, the object is to ascertain the intention of the parties. *Johnson v. Newfane*, 40 Vt. 9. To find the intention of the parties, the court will examine all the surrounding circumstances, and what was said and done by the parties when the condition was annexed to the subscription. Addison Con. 847-8-9-50; 2 Story Con. 65, § 671 a; *Mannway v. Jones*, Busbee (N. C.), 368; *Morton v. Wells*, 1 Tyler, 381; *Barrows v. Lane et al.* 5 Vt. 161; *Rawley v. The Empire Ins. Co.* 36 N. Y. 2; *Ins. Co. v. Olmstead*, 21 Mich. 246.

The condition is not such a contract in writing as cannot be varied by parol. It is only a condition in favor of the defendant,

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annexed to an existing valid contract; and the terms and conditions on which it was accepted, and the meaning of the condition, can clearly be shown by parol. It is like any other parol change of a written contract not under seal, made after the contract was executed, which may be proved by parol. *Flanders v. Fay*, 40 Vt. 316; *Lawrence v. Dole*, 11 Vt. 549. If it is claimed that the condition has relation back to the date of the subscription, then the verbal agreement made by the defendant at the time the condition was annexed, would be binding upon the defendant, and might well be shown by parol. Written contracts may be abandoned or waived by subsequent parol contracts before breach. 2 Phil. Ev. 365; 4 Ib. 605, n. 298; *Briggs v. Vt. Central Railroad*, 31 Vt. 211.

The contract of subscription was valid; the condition annexed thereto is void for want of consideration.

The defendant would be estopped from claiming that said condition required a subscription of more than \$40,000 besides his own, if the plaintiff could establish the fact offered to be proved, and which, for the purposes of this trial, must be taken as true, to wit, that on the 20th of December, 1869, the defendant agreed with the plaintiff that if the plaintiff would procure subscriptions from individuals in Montpelier to the amount of \$40,000 besides his subscription, it should be a compliance with said condition, and that, relying thereon, the plaintiff did, at great trouble, &c., procure the subscriptions. *Halleran v. Whitcomb*, 43 Vt. 306; *Spiller v. Scribner*, 36 Vt. 245; *Hicks et al. v. Cram et al.* 17 Vt. 449; *Kenney v. Farnsworth*, 17 Conn. 355; *Whittaker v. Williams*, 20 Conn. 98; *Shaw v. Beebe et al.* 35 Vt. 205; *Wooley v. Edson et al.* Ib. 214; *Ham v. Cole*, 48 N. H.; *Malony v. Haran*, 53 Barb. 29; *Brown v. Wheeler*, 17 Conn. 345.

*Heaton & Reed* and *B. F. Fifield*, for the defendant.

Where there is a written contract, the general rule excludes extrinsic evidence to aid in its construction. 2 Phil. Ev. 529, 540, n. 487; 1 Greenl. Ev. § 275. But parol evidence is admitted to explain the words used, and to show their application, and the application of surrounding circumstances. 1 Greenl. Ev. §§ 277,

282, 288. But not to vary, add to, or contradict the writing. 2 Phil. Ev. 534, 540, n. 478. All prior and contemporaneous stipulations and arrangements must be considered as merged in the writing. 2 Phil. Ev. 558, n. 494, and cases cited; *Gilman v. Moore*, 14 Vt. 457.

To interpret the words used in a written contract, is one thing; to admit direct intention of the parties independent of the writing, is another. Such evidence has always been excluded. 2 Phil. Ev. 533, 534, n. 486; 1 Greenl. Ev. § 277; *Warren v. Wheeler*, 8 Met. 97; *Bigelow v. Collamore*, 5 Cush. 226; *Tibbitts v. Perry*, 24 Barb. 39; *Comstock v. Van Dusen*, 5 Pick. 166; 2 Phil. Ev. 631, n. 516, 633-4-5, and notes.

The condition excludes the defendant's subscription from the \$50,000. He subscribes his own name in the first person, and describes a class of subscribers in the third person, thus excluding himself.

The expression of opinion upon a matter of law, does not conclude a party making it, although it may influence action towards himself, or relative to his affairs, by another. *Brewster v. Striker*, 2 Comst. 19. The defendant's admission was one of law, and nothing more. Estoppel *in pais* by representation must be one of fact. Big. Estop. 480, 497.

The opinion of the court was delivered by

BARRETT, J. In the judgment of the court, the true meaning of the condition in question, as indicated by its terms, interpreted with reference to the subject-matter, and in the light of attending circumstances, is, that the \$10,000 subscribed by the defendant, was to count towards the \$50,000 to be subscribed within the year. The form of the expression does not import an exclusion of the defendant's subscription from such counting. The verb, "subscribe," as it is here used, seems to import subscriptions made within the time named, without indicating any assignment of time, as past or future, for the making of such subscriptions; but only that, prior to the close of the prescribed period, the required amount should be subscribed. It is used in the present tense, and has reference to the period as a continuing present to

its close—meaning, subscribe at any time within it. In this view, the defendant's subscription is embraced in, and not excluded by, the terms of the condition. It is not claimed in argument that it was not made within the period. As favoring this view of the intent and meaning of such use of that word as a member of the sentence, it is obvious to be remarked, that, if it had been designed to exclude the defendant's subscription, naturally, and according to the prevailing use of language—for such a purpose, the future tense would have been given to the verb by prefixing "*shall*," or the word *other* would have been used before "good and responsible individuals."

We repeat, then, in another form of expression, that the meaning of the condition is, that \$50,000 in all should be subscribed by persons of the character designated, within the time limited. The defendant was one of that class, and the required sum was subscribed in satisfaction of the condition.

This case presents another ground on which we think the defendant would be liable, even upon his own construction of said condition. We recognize the common and familiar doctrine, that a written contract may not be varied or contradicted by parol evidence. At the same time we recognize the doctrine, equally well settled, that a party may vary his liability and rights, as fixed by a written contract, by what he may agree or do subsequent to the making of such written contract. After the condition had been annexed in December, 1869, to the subscription as it was originally made in the January before, and had continued to be till said condition was annexed to it, the defendant agreed, that, if the plaintiff would procure \$40,000 from individuals in Montpelier, it should be a compliance with said condition; and "on that agreement with the defendant, the commissioners then and there accepted the subscription annexed as aforesaid"; and, relying on it, the plaintiff canvassed said town, and, at great trouble and expense of time and money, procured within the time, proper subscriptions, to the amount of \$40,700 beyond that of the defendant, and of this the defendant was duly notified. We find coined to our hand by our Ch. J. REDFIELD, an admirable statement of the law as we understand it to be, which is exactly applicable to the

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exigency of this case upon the facts thus recited. *Strong v. Ellsworth*, 26 Vt. 373. "The doctrine of estoppels in pais \* \* \* lies at the foundation of morals, and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon. He, who, by his words or his actions, or by his silence even, intentionally or carelessly induces another to do an act, which he would otherwise not have done, and which will prove injurious to him, if he is not allowed to insist on the fulfillment of the expectation upon which he did the act, may insist upon such fulfillment." The same doctrine was comprehensively expressed by the same judge in 17 Vt. 455; and it is repeated and applied by judge ROYCE in *Halloran v. Whitcomb*, 43 Vt. 307, with a sanction which has such peculiar aptness and force in the matter now in hand as to justify the repeating of it here. "This doctrine is founded upon the plainest principles of morality and justice, and its application is to prevent fraud and promote justice."

How, in this view, the validity of the condition would be affected as depending on the ground and reason on which the commissioners accepted the subscription with that condition annexed, as stated in the exceptions, need not now be decided. How the defendant's right to have the operation given to the condition that he now claims, is affected by this doctrine of the law, is very plain. He is estopped to do so.

We see no occasion for the present to consider the case with reference to the question, whether the defendant could be held by force of his promise, as a parol contract made subsequently to the written one, and as an addition to it.

Judgment reversed; cause remanded.



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HENRY G. MORTON, HANNAH L. MORTON, AND JONATHAN BLAKE,  
v. DANIEL H. ONION, EXECUTOR OF POLLY CARY.

*Married Woman. Will.*

The rule that the marriage of a woman revoked a will made by her before marriage, rested for its reason on the fact that, by virtue of the husband's marital rights, the woman, becoming *covert*, became thereby disabled to dispose of the property named in the will,—the will ceased to be ambulatory. Hence, where a *feme sole* made a will, and married, and a considerable portion of the property disposed of by the will remained in her, unaffected upon her death by any marital rights of her husband, who survived her, it was *held*, that the will was entitled to be probated.

APPEAL from a decree of the probate court for the district of Chittenden, establishing the will of the said Polly Cary. Trial by jury, at the April term, 1871, Chittenden county, PIERPOINT, Ch. J., presiding.

The said Hannah, who is the wife of the said Henry, was a niece, and the said Jonathan was a nephew, of the said Polly, and both were heirs of the said Polly. The will was executed on the 20th day of October, 1864, and at the time of its execution, said Polly was a single woman, and her name was Polly Tomberson. On the 3d day of February, 1867, said Polly was legally married to Jonathan W. Cary, and died in August, 1868, while the wife of the said Jonathan. The probate of said will was opposed by the contestants, because it was executed by the said Polly while she was sole and unmarried; and, after the execution thereof, she married the said Jonathan, and was his lawful wife at the time of her death.

On trial, the proponent, after introducing the subscribing witnesses to the will, who gave testimony tending to show its legal execution, introduced said Jonathan, who testified that he married the said Polly about the 2d day of February, 1867. The proponent then offered to prove by him what transpired between him and the said Polly before the marriage, and subsequently; and that subsequently the understanding was substantially fulfilled, and that the witness then desired the will to be established. To this testimony, the contestants objected, but the same was admit-

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ted by the court, limiting it to what passed between the parties prior to the marriage, in relation to the will, and to the assent of the witness since the death of said Polly. Exceptions by contestants on both points. The witness then testified, under objection, that before his marriage to said Polly, he knew she had made a will; that she told him she had; that she told him she had willed to a missionary society, of New York, eight thousand dollars, in consideration it should not amount to over one half her property, and her niece, Mrs. Hannah Morton, of St. Albans, was to have all her household furniture and clothing, and the remainder, after paying debts and funeral expenses, was to go to the congregational society of Milton; that it was understood she was to make some provision for the witness out of her property; that this was an agreement before marriage; that her mother was to have provision out of it if she survived; that she made an arrangement for the witness which was a life provision for him; that what she proposed to do, was satisfactory to the witness at the time; that it was then his desire that the will should be carried out. To the admission of all which testimony, the contestants excepted.

On cross-examination, this witness testified that he lived with Miss Tomberson before their marriage, and that she informed him just before the marriage, that in case of marriage, she would change her will; that that was the understanding when he married her; that it was an arrangement at the time of the marriage, that she should change the will, so that he would have a maintenance out of the property—have the use of the property, a part of it, after her death; and that after the death of the said Polly, he claimed all the personal property which was on the estate there; that his claim to it, and his claim to the estate, were settled by an arbitration which lasted about eighteen days; that he was not present at the probate court when this case was heard, but that he gave his consent in writing to the establishment of the will, to be used there.

The contestants asked the witness to state how that writing was procured of him, by whom, and where; which was objected to by the proponent, and excluded by the court, to which the con-

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testants excepted. The witness then stated, that thirty-five days after the death of Mrs. Cary, he signed the paper assenting to said will, which was used at the probate court; that said paper was signed at Jed P. Clark's office, in Milton; that Clark, Chester Witters, and Dr. Onion, were present. The witness was then asked to detail to the jury that transaction, to which the proponent objected.

The contestants then offered to show by the witness that he was induced to give his consent to this will by false representations, representations which turned out to be untrue when he first gave his assent to the establishment of this will, which was excluded by the court. They then proposed to show, that after Mrs. Cary's death, Mr. Cary asserted that he should not consent to the will, and did not consent to it; and that about thirty-five days after her death, in the office of Jed P. Clark, Mr. Cary was induced to sign a written consent, by representations held out to him on the part of Dr. Onion, the executor, which were false in themselves; that he was induced, on false representations, to give his written consent, and did give it under these circumstances; and that subsequent to giving that consent under these circumstances, his rights in regard to his claim to the real estate, and all of his interest by way of law, or otherwise, in the personal property of the estate, were submitted to Judge Russell, of Burlington, and Judge Sampson, of St. Albans, and an arbitration held, and the rights of said Jonathan determined, and that the award of that arbitration had been complied with, and that the witness then had no interest whatever in the estate as to whether the will was established or not.

The court decided that, as it was admitted that the assent of the said Cary to the establishment of the will then given in court, was without misunderstanding or misconception, but given with a full knowledge of all the facts, the evidence offered became immaterial, and excluded it; to which the contestants excepted.

On re-direct examination, this witness stated that he had no children born alive of this marriage; that he was married on the 2d day of February, 1867, and that Mrs. Cary died on the 2d day of August, eighteen months afterwards. He was asked whether

his support was provided for subsequent to the marriage, and said it was, which was objected to. He was asked to state whether it was done to his satisfaction. The contestants objected to the witness stating what took place on the subject after marriage. But the court admitted the same; to which the contestants excepted. The witness stated that it was agreed upon by him and his wife, and that it was satisfactory; that he had a lease of her farm. To this the contestants excepted.

On re-cross examination, the witness stated that he was to have the use of the homestead, farm, and the cattle, during his life; that he did not have them, but he had a substitute on the Dixon farm; but that he claimed after the death of his wife, that the understanding was before marriage that he was to have her watch and the safe, which, in the will, were otherwise disposed of; and that the agreement to change the will was before marriage; that he testified before the arbitrators, and said then that he was to have the use of her property during his life.

The will was then read; to which the contestants excepted.

The contestants introduced a certified copy of the certificate of the marriage of Mrs. Cary, by which it appeared that she was married to Jonathan W. Cary on the 3d day of February, 1867, and then rested their case. The facts which the evidence tended to prove not being controverted, and neither party desiring to go to the jury upon any fact in the case, the court directed the jury to return a verdict establishing the will. Exceptions by contestants.

*Davis & Adams* and *E. R. Hard*, for the contestants.

The common law rule that the will of a *feme sole*, whether of real or personal estate, is, under the statute of Henry VIII., and similar ones, absolutely revoked in law by her subsequent marriage, is established beyond controversy by a uniform course of decisions, both English and American, extending from *Forse and Hembling's* case, 4 Co. 60, to the present time, and is sustained by all the elementary writers upon the subject. 1 Jarman, 37; 4 Kent Com. 624; 1 Redf. on Wills, 293; Sch. Dom. Rel. 251; 1 Wms. Exrs. 93-5; 4 Burn Ec. Law, 47.

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The marriage of the testatrix was a complete revocation of her will, both as to her real and personal estate. The application of the foregoing rule to this case, is sought to be avoided on the ground that, at the time of the execution of the will, and of the decease of the testatrix, married women, by virtue of the general provisions of the statutes of this state concerning wills, could dispose of their estates, both real and personal, by will. The act of 1847 expressly gave married women power to devise their lands, tenements, and hereditaments; but prior to that statute, married women possessed no testamentary powers, except the limited ones which existed under the statutes of Henry VIII.

Before the passage of 34 & 35 Henry VIII., which expressly prohibited devises by married women, it was held that under the 22 Henry VIII. (which is substantially the same as sec. 1, ch. 49 of our Gen. Stat.), a married woman could not make a valid will of lands. 1 Jarman, 30; 1 Pow. on Dev. 140; *Colverly's case*, Dyer, 354. Under statutes almost identical in phraseology with § 1 above referred to, it has been held in Massachusetts, New Hampshire, and several other states, that married women were incompetent to make valid wills. *Osgood v. Breed*, 12 Mass. 525; *Marston v. Norton*, 5 N. H. 211; Sch. Dom. Rel. 258.

But, whatever the statutory source of a married woman's power to make a will, the rule that her subsequent marriage is a revocation of her will, is in full force in this state. The rule is of such long standing, and so thoroughly established, that it is reasonable to suppose that the legislature would have expressly declared its abrogation, if such was the intention. The rule of revocation by marriage was always, under the statutes of Henry VIII., and similar ones, applied as well to wills which, even under those statutes, a married woman was empowered to make, as to those which she was held incompetent to make. Even when general testamentary power is denied, she has always been held competent, independently of any control or consent of her husband, to make a testamentary disposition of personalty, not reduced to possession, to which she is entitled as executrix; of personalty coming or secured to her separate use during coverture; of savings out of an allowance made by her husband for her separate

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use ; of assets and accumulations of property conveyed to trustees for her separate use ; of all her estate, real and personal, when her husband is *civiliter mortuus* ; and, with the consent of her husband, of any or all of her personalty. She may also make a testamentary disposition of both real and personal estate, under a power for that purpose. 1 Redf. on Wills, 22, *et seq.* ; 1 Jarman, 30, *et seq.* ; Sch. Dom. Rel. 251, *et seq.* ; *Taylor v. Mead*, 10 Jur. N. S. 127 ; *Hale v. Waterhouse*, 11 Jur. N. S. 361 ; *Holman v. Perry*, 4 Met. 496. Yet the rule under consideration has always been expressed by elementary writers, and by judges, without any qualification or exception, and in language clearly embracing cases in which the will of a married woman would be valid, as well as in cases in which it would not be. *Van Wert v. Benedict*, 1 Barb. Sur. R. 119 ; *Southby v. Stonehouse*, 2 Ves. Sen. 611 ; *Marlboro v. Godolphin*, Ib. 75 ; *Cotter v. Layer*, 2 P. Wms. 623 ; *Hodsden v. Lloyd*, 2 Bro. C. C. 534 ; S. C. 2 T. R. 684, entitled *Doe d. Hodsden v. Staple* ; *Lomis v. Loomis*, 51 Barb. 257.

At the time of the execution of this will, there was no statute, expressly, or otherwise, empowering married women to dispose of their personalty by will. But, it is claimed, that as to the personalty, the will is rendered valid by the assent of the husband during coverture, and since the decease of the testatrix. At common law, except in the instances above referred to, and, perhaps, some others, the assent of the husband is essential to the validity of a married woman's will. 1 Jarman, 81, 82 ; 1 Redf. on Wills, 22 ; *Cutler v. Butler*, 5 Foster, 343 ; *George v. Bussing*, 15 B. Mon. 558 ; *Newlin v. Freeman*, 1 Ired. 514. The evidence does not show such assent before the decease of the testatrix ; and if the will was revoked by the marriage, his subsequent assent alone, after marriage, would not revive it. 1 Redf. on Wills, 374 ; Sch. Dom. Rel. 259.

*C. W. Witters, H. S. Royce, Daniel Roberts, and E. J. Phelps,*  
for the proponent.

The question is upon the *probate* of the will ; and it must be probated, unless *wholly* revoked after execution. A revocation

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may be total, or partial. If only partial, the will must be established subject to such partial revocation, that it may operate so far as not revoked. The question is not what property may pass under the will. It may be a good will, though there be nothing to pass under it. *Waters v. Cullen*, 2 Bradf. 354; *Osgood v. Breed*, 12 Mass. 533; *Paglar v. Tongue*, 1 P. & D. 158; 1 Jarman, 23; *Blandin v. Blandin*, 9 Vt. 210. But, it is claimed that the will was revoked by *implication of law*, by reason of the subsequent marriage of the testatrix. This objection cannot prevail, because it does not appear that such revocation was necessarily total, and because it does not appear that the contestants have such an interest as to give them the right to raise the question. The rule that coverture revoked the will of a *feme sole*, was never absolute and universal. 1 Wms. Exrs. 156; 1 Redf. on Wills, 293; Sch. Dom. Rel. 251. Manifestly, that rule does not apply to a case in which the marriage works no change of condition as to the power of disposing. But a *feme covert* may devise what she holds as executrix. So when the estate was limited to uses, and a power was given to declare the uses, she could declare the uses by her will. So when the estate comes to her, or is held by her, to her sole and separate use, the *jus disponendi* is necessarily incident; as to such estate, she is a *feme sole*, and may dispose of it by will. 1 Wms. Exrs. 46, 156; 1 Jarman, 31-33; Sch. Dom. Rel. 253 *et seq.*; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *American Mis. Soci. v. Wadhams*, 10 Barb. 597; S. C. 2 Kernan, 415; *Frery v. Booth*, 37 Vt. 78. As to such estate, so held, the will of a *feme sole* could not be affected by marriage. *Logan v. Bell*, 1 C. B. 873; *Hodsdon v. Staple*, 2 T. R. 684. Since, then, it does not appear by what title the estate named in the will was held, it cannot be said, under the English rule, that the marriage of the testatrix revoked the will, either wholly or in part.

The rule was made only for the sake of the husband, and since in this case the husband is satisfied with the will, and assents to its probate, the contestants have no such relation to the question, or *status* in court, as to enable them to raise the question. 1 Jarman, 110; *Sheath v. York*, 1 Ves. & B. 390. Admitting that by

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the English law the will of a *feme sole* is generally revoked by marriage, that rule does not apply in Vermont. The reason of the rule has no application here, and *cessat ratio, cessat lex*. In England, her disability to devise *lands* was declared, if not created, by statute. 34 & 35 H. 8, ch. 5, s. 14; 1 Jarman, 80; 1 Wms. Exrs. 45; *Fisher v. Kimball*, 17 Vt. 328. Her disability to bequeath *personal* estate, was a rule of law based upon notions of public policy as connected with the dominant rights of the husband. 1 Jarman, 80; Sch. Dom. Rel. 251. In Vermont, the testamentary power of the wife is as ample as that of the husband, and, it would seem, has always been so. Statutes of 1797, p. 209; Slade's Stat. 336; REDFIELD, J., in *Fisher v. Kimball*, *supra*; Rev. Stat. (1839) ch. 45, §§ 1, 4; *Allen v. Little*, 5 Ohio, 65; Sch. Dom. Rel. 258. In 1847, the power was expressly given to married women to devise their real estate, and in 1870, to bequeath their personalty. But, whether or not such right has always existed in this state, it existed at the date of the execution of this will, and ever since. The English rule does not apply here, for the further reason, that "we have no wills as, or by force, of common or ecclesiastical law, but only by statute." BARRETT, J., in *Warner v. Warner*, 37 Vt. 368; and no statute has ordained that marriage shall revoke the will of a *feme sole*. By English, as well as by American, law, the wife can, without any enabling statute, make a valid will of personalty, with consent of her husband, but upon condition that he survive her, and does not after her death disaffirm his consent already given. *Fisher v. Kimball*, *supra*; 1 Wms. Exrs. 46, 47; Sch. Dom. Rel. 251-2-3, and note. The husband consented to this will during coverture, and since, and expressed his desire to the probate court, and to the county court, that it be probated. This is a clear waiver of any right which he may have had. Sch. Dom. Rel. 252; 1 Wms. Exrs. 45-49; 1 Redf. on Wills, 25.

The opinion of the court was delivered by

BARRETT, J. It is the opinion of the court that the rule, that the marriage of a woman revoked a will made by her before marriage, rested for its reason on the fact, that, by virtue of the hus-



band's marital rights, the woman becoming *covert* became thereby disabled to dispose of the property named in the will. The will ceased to be ambulatory. It is only in view of the supervening rights of the husband, accruing by the fact of marriage, as to her property, that the rule had any ground or reason. The change of condition effected by marriage, as that expression is sometimes used, derives all its significance, as well as its operative force, as a revocation of a will, from the fact that peculiar rights accrue to the husband in respect to the property owned by the wife at the time of, or coming to her during, her coverture. Under our statutes since 1797, that rule could have operation in this state only for the reason thus assigned, for they contain no disabling provisions. In the present case, considerable of the property disposed of by the will remained in the testatrix, unaffected upon her death, by any marital rights of the husband. We think the will entitled to be probated.

As to the assent of the husband as affecting the disposition of personal estate of the wife by will, the true doctrine of the law seems to us to be stated by the lord chancellor in *Lloyd v. Hodgson*, 2 Bro. Ch. Rep. 584. To what extent the application of that doctrine may differ in this state from its application in England, on account of the difference as to the rights of the husband in reference to the personal effects of the deceased wife in the two jurisdictions, is not important now to be discussed or determined.

The judgment is affirmed.

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Palmer, executor, v. Preston.

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E. F. PALMER, EXECUTOR OF LUTHER HENRY, v. RICHMOND  
PRESTON.

*Judgment. Discharge in Bankruptcy.*

The recovery of a judgment upon a contract induced by a fraud, is a waiver of the fraud, and the judgment is not a debt created by fraud, within the meaning of the bankrupt act; and the plea of a discharge in bankruptcy, is a good defence to an action of debt founded upon such judgment.

DEBT on a judgment recovered by the testator in his lifetime, at the September term, 1865, of Chittenden county court, against the defendant and one William Keach—upon whom process was not served in this case, and who did not appear—for the sum of twelve hundred and ninety-two dollars and twelve cents, damages and costs, upon which said judgment execution had issued and been returned unsatisfied, except as to the sum of seven dollars. The defendant pleaded his discharge in bankruptcy. The plaintiff replied that, on the 28th of January, 1865, the defendant and the said Keach fraudulently conspired together to cheat the testator, and afterwards, to wit, on the same day, at Waterbury, in the county of Washington, the defendant, in pursuance of such fraudulent conspiracy, by falsely and fraudulently concealing that he, the said defendant, was insolvent, and that he had no funds in the hands of the said Keach, and by fraudulently concealing the fact that he intended immediately, to wit, on the 30th day of said January, to abscond and leave the state, and by then and there falsely and fraudulently representing that he was in need of money, to wit, twelve hundred dollars, and that, if the testator would assist him to raise it, the same should be paid in five days therefrom, and that said Keach was then owing him a large sum, to wit, twelve hundred dollars, did then and there induce the testator, by means of the fraudulent concealment and the false and fraudulent representations aforesaid, to indorse and deliver to the said defendant a draft to raise money upon in the words and figures following:

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“ WATERBURY, January 28th, 1865.

*To Wm. Keach, Esq., Burlington, Vt. :*

Five days after date, pay to the order of Luther Henry, twelve hundred dollars, and charge the same to the account of Wm. Keach, Esq. Payable at Farmers and Mechanics' Bank, Burlington.  
[Signed] RICHMOND PRESTON ;”

that the said defendant was then and there wholly insolvent, and had no funds in the hands of the said Keach, and that he thereafterwards, to wit, on the 30th day of January aforesaid, absconded and left the state, of all which the testator was then and there ignorant, but all which the said defendant then and there well knew; that the said defendant was not then and there in need of money, and did not intend that said draft should be paid at maturity, and had no money in the hands of the said Keach, all which the said defendant well knew; that the testator, believing the representations of the defendant in that behalf to be true, relied on the same; that the said defendant, afterwards, to wit, on the day and year first aforesaid, at said Waterbury, negotiated said draft at the Waterbury National Bank, and got the money thereon, to wit, twelve hundred dollars; that when said draft matured, the same was protested for non-payment, by means whereof the testator became liable to pay, and did pay the same, to wit, twelve hundred dollars; and that the judgment in said declaration mentioned was based upon said sum of twelve hundred dollars so as aforesaid paid by the testator. The defendant rejoined that the plaintiff's said action was an action of debt on a judgment recovered by the consideration of Chittenden county court during the lifetime of the testator, and not after his decease, and that the suit in which said judgment was rendered was an action of assumpsit founded upon said draft, as set forth in the plaintiff's replication, or upon money to pay the same, and was not for any other or different cause of action. To which rejoinder the plaintiff demurred generally.

The court, at the March term, 1871, Washington county, PECK, J., presiding, sustained the demurrer, and adjudged the rejoinder insufficient, and rendered judgment for the plaintiff to recover the amount due upon said judgment; to which the defendant excepted.

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*Randall & Durant* and *T. J. Deavitt*, for the defendant, cited *Fisher v. Brown*, 1 Tyler, 387; *Dater v. Currier*, Washington Co., not reported; *In re Whitehouse*, 4 Bank. Reg. 15; *In re Patterson*, 1 Bank. Reg. 58; *In re Robinson*, 2 Bank. Reg. 108; Bump on Bankruptcy, 392; 9 Gray, 211; 53 Me. 346; *People v. Smith*, 51 Barb. 360; 11 Peters, 91; *United States v. Leffler*, 12 Curtis's U. S. Rep. 356; Broom Leg. Max. (4th ed.) 225.

*Clough & Palmer*, for the plaintiff, cited *Dana et al. v. Binney et al.* 7 Vt. 493; 1 Bouv. Law Dict. 738; 3 Blackf. 151, 157; 7 Vt. 501; 23 Vt. 568; 38 Vt. 375; 40 Vt. 112.

The opinion of the court was delivered by

Ross, J. It is conceded by the pleadings that the judgment which is in suit, was obtained upon the defendant's contract as the drawer of the draft which the plaintiff's testator indorsed at the defendant's request, and afterwards was obliged to pay. It is also conceded by the pleadings that the indorsement by the testator was procured by the fraudulent representations of the defendant, but that this fraud was not the foundation of the judgment now in suit. The question presented is, whether this fraud on the part of the defendant can be set up and become operative to defeat the bar which the defendant's discharge in bankruptcy would otherwise be to the prosecution of this suit. The 33d section of the bankrupt act provides, among other things, that "a debt created by fraud" shall not be discharged by the operation of the bankrupt law. The vital question in the case is, whether the debt sought to be collected in this suit was "created by fraud." If so, the defendant's discharge in bankruptcy is no bar to the enforcement of its payment by the court. If the record of the judgment in suit is examined, it will be found that the debt evidenced by the judgment, was created by the contract which the defendant entered into when he, as drawer, obtained the indorsement of the testator upon the draft, that if the testator should be compelled to pay the draft to the drawee, or his assignee, he, the drawer, would pay it to the testator. There is nothing in the record of the judgment sought to be enforced by

this suit, that furnishes the slightest intimation that the transaction by which the debt was created, was tainted with fraud. The plaintiff's testator has elected to treat it as a debt created by contract, and so far as the judgment in suit is concerned, has waived all fraud. In an unreported decision in this county, *Charles M. Reed v. James M. Currier*, special term, 1851, and another case against the same defendant,\* it was held by this court that a party, having the right to enforce the collection of a debt, either by action on a contract, or by an action on the case for fraud, who has pursued his remedy by action on the contract to judgment, cannot afterwards pursue it by action on the case for fraud.† This is in accordance with the decisions of courts of other states. It is also well settled that the judgment in suit is, as against the defendant, for the enforcement of a debt created by contract. The defendant would not now be allowed to impeach that judgment by showing that no such contract, as the record of the judgment discloses, existed between the testator and himself, or that the indebtedness evidenced by the judgment was created by fraud and not by contract. The judgment, being conclusive upon the defendant as to the manner in which the indebtedness evidenced by the judgment was created, ought to be equally conclusive upon the plaintiff's testator in the same particular. We think the judgment in suit must be equally conclusive and binding upon both parties to it, in regard to the manner in which the indebtedness was created, unless the judgment itself was procured by the fraud of one of the parties. These views are not in conflict with the decisions of the United States courts in regard to this section of the bankrupt act. *In re Whitehouse*, 4 Bank. Reg. 15, on the petition of the bankrupt to be discharged from arrest on an execution issued by the state court on a judgment, in which the record showed the cause of action to have been deceit, LOWELL, J., with the concurrence of SHEPLEY, J., held that the judgment of the state court did not so far merge the cause that the court could not look into the record and see that the cause of action was deceit, and says: "We are of the opinion, however, that

\* I am indebted to judge REDFIELD for a statement of these cases.

† See *Dyer v. Tilton*, 23 Vt. 313, 318; and *Poor v. Woodbury et al.* 25 Vt. 234, 241, where that case is cited approvingly.—REPORTER.

the record of the action, whichever way the execution issues, may be looked at, and if it shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. I do not intend to express any opinion upon the question whether a judgment in an action of contract, in which an allegation of fraud, if made, would be immaterial, might not be such a merger, or waiver, as is contended for. It might be very difficult to admit evidence to vary or contradict the record in favor of the creditor, when the debtor would be concluded on his side. Nor do I even mean to say that a suit on this judgment might not remove the fraud beyond the view of the court." The judgment of the state court under review, was evidently recovered under the practice prevailing in some of the states, which allows the plaintiff to join several distinct causes of action, arising *ex contractu*, and tortwise, in the same bill of complaint, and permits him to take an execution either against the defendant's body, or against his property, if he prevails on that portion of the complaint sounding in tort. Hence the remark of judge LOWELL, "The record of the action, whichever way the execution issues, may be looked at, and if it shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be one founded in fraud."

*In re Ward E. Robinson*, 2 Bank. Reg. 108, S. C. 6 Blatch. R. 253, on an appeal from the district court to the circuit court by the bankrupt, because the district court refused to discharge him from arrest and bail, and refused to hear evidence to show that the debt was not created by fraud, where the record showed the debt, which had gone into judgment in the court of common pleas, and which was being enforced by the arrest of the bankrupt, originated in fraud, Judge NELSON says: "The court below held that the proceedings and judgment in the common pleas, the record of which was produced before it according to the practice and course of proceedings in that court under the New York law, carried on the face of them that the suit was one to recover a debt created by the fraud of the debtor; and that it would not go behind that record,

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Palmer, executor, v. Preston.

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to call in question its verity in the bankrupt court. We concur in this view." If the record, where it shows the indebtedness sought to be enforced was created by fraud, is to be held conclusive of that fact upon the defendant in the record, it must be equally conclusive upon the plaintiff in that record. If the fact that the debt was created by fraud is *res adjudicata* as to one of the parties to the judgment, it must be as to the other. Nor is the rule or law different where the record of the judgment shows that the debt sought to be enforced was created by contract. The defendant in the judgment cannot go behind the judgment, to call in question its verity, neither can the plaintiff. The matter is *res adjudicata* as to both parties to the judgment. This being so, the plaintiff, executor in this action, cannot be allowed to plead, or show, that the debt sought to be collected was created by fraud, when the record of the judgment in suit, and which was recovered by the testator in his lifetime against this defendant, shows, that this very indebtedness was created by contract, and, for that reason, discharged by the defendant's discharge in bankruptcy.

Judgment of the county court is reversed, and judgment that the defendant's rejoinder is sufficient.

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HENRY S. ROWAN v. THE STATE BANK, SANDERSON BROTHERS  
& Co., AND THE UNION ARMS Co.\*

[IN CHANCERY.]

(S. C. 36 VT. 124.)

*Chancery. Conditional Sale. Promissory Note. Collateral Security. Contract. Forfeiture of Property by Accession and Confusion. Rights Acquired by Attachment of the Interest of a Conditional Vendee. Accounting. Master's Report.*

A question once decided in a case, is not open for revision in the same case.

On the 21st of September, 1857, the defendants, Sanderson Brothers & Co., and the State Bank, relying upon the representations of the U. A. Co. that the latter had been organized with, and had, sufficient capital and means to enable them to carry out their contract with F. H. & Co. for the manufacture and delivery at certain specified times, of a large number of rifles, the interest of F. H. & Co. in which contract had been assigned to the orator, sold to the U. A. Co. a large amount of machinery, tools, and stock, for the manufacture of guns, upon condition that the title thereof should not pass until the payment of the notes of said company, given in consideration of said sale, and payable on demand. The contract of sale provided, among other things, that all the manufactures, and all the sales and transfers of property, by said company, and of all property arising in whole or in part from the proceeds thereof, should be made with the consent of the agent of said defendants, and that such agent should receive all the proceeds of such sales and transfers, and apply in payment of said notes so much thereof, as, in his judgment, was not necessary for said company to have for the payment of laborers and mechanics, and the purchase of stock.

On the 19th of October, 1857, said contract was modified, at the request of the orator, by a supplemental agreement, which provided that said company might go forward and use the property sold as aforesaid, and make up and deliver to purchasers any portion of said stock, from time to time, as the same should be manufactured and ready for delivery, provided all sales were made by said company with the consent of said agent, and the proceeds thereof paid to him according to the original contract; the said defendants reserving the right to stop all use and sales of said property on the first, or any subsequent violation of the original contract, touching the said sales and the proceeds thereof. And it was held, that said original contract did not alter or vary the time of payment of said notes.

That the proceeds of the sales and transfers of the property embraced within the terms of said contract, which might be applied to the payment of said notes, were in the nature of collateral security, and that said defendants might collect said notes from other means of said company, or pursue their collateral remedy, or pursue both remedies, until they obtained payment of the notes.

That said supplemental agreement did not make said notes payable by installments, but that it did constitute an agreement that the payments arising from such collateral

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\* This case was argued at the general term, in November, 1856, and the opinion of the court delivered at the February term, 1857, Windsor County.



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security should be made from time to time when said rifles were delivered, and that the said defendants would not, in the collection of said notes according to their tenor, interfere with the property embraced in said conditional sale, unless said company failed to perform the agreement under which they were permitted to use the same.

That, under the circumstances, the right of said company to go forward and use said property as aforesaid, or to retain the possession thereof, also depended upon an implied condition that they would perform their contract with F. H. & Co.

That the orator acquired no such interest in the property embraced in said conditional sale, by virtue of said supplemental agreement, as to embarrass the rights of said defendants in relation thereto.

That the neglect of said company to provide the necessary means for prosecuting the work of manufacturing said rifles, in consequence of which said defendants were compelled to furnish means, or, perhaps, sustain a greater loss, was such a breach of the contract as gave said defendants the right to take and dispose of the property for the purpose for which it was incumbered.

Said U. A. Co. was a corporation organized under the laws of Conn., for the purpose of manufacturing guns, and established in that business at Hartford, in that state, and also carried on the same business at Windsor, in this state. Said original contract provided that all parts of guns, and all materials which should be mingled with the property at Windsor, should, as to the sales and proceeds thereof, be subject to the provisions of said contract relating to the property at Windsor. Said supplemental agreement authorized said company to forward from Windsor to their Hartford factory, any portion of the stock embraced in said original contract; and a portion thereof was forwarded accordingly; so that, on the 3d of April, 1868, the property at Windsor and at Hartford consisted of property embraced in said contract, and of other property belonging to said company, intermingled. *Held*, that the property of said company, so intermingled, became subject to the provisions of said contracts, and that said defendants became mortgagees thereof, and had the right to enter the factory of said company, at both places, and take all of said property.

On the 17th of April, 1868, the business of manufacturing said guns ceased to be done by, or in the name of, said company, and thence, to the last of June, was continued by said defendants, without any agency or interference of said company, during which time said defendants furnished a large amount of new material which was used in the business, and was deemed necessary in order to close the business for the best interest of the defendants and said company. *Held*, that no part of the new material thus used was, on the principle of confusion and accession, forfeited by the defendants, it being necessarily furnished in order to complete the work commenced; but that the same became subject to the provisions of said contract as to the property previously purchased by said defendants.

After the property embraced in said contracts had been taken into the possession of said defendants by the consent of said company, for a breach of the contracts by said company, the orator attached it as the property of the company. *Held*, that the orator thereby became subrogated to the rights of the company in the property, and that the fact that the property was taken by the consent of the company, was important in determining the rights of the company in relation thereto; but that the orator did not thereby acquire any right to interfere with any prior legitimate transaction between the defendants and said company in relation to the property, or to go back, to object to any *bona fide* contract or payment made prior to the attachment.

When one is liable to account for the property of another rightfully taken by him, and which he has managed and disposed of in good faith, and with common prudence and due diligence, he is only liable for the amount actually realized by him.

When property held as collateral security is taken into the possession of the creditor in such an unfinished state that a court of chancery would order it finished by a receiver, and the creditor does in that respect what chancery would have ordered, he is properly chargeable with the avails thereof when finished, notwithstanding it was finished with his property and by his means; but equity requires that the avails thereof should be applied to the extinguishment of the creditor's disbursements in that behalf,

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before any application is made upon the debt; and any equity acquired by an attachment of such unfinished property as the property of the pledgor, is subordinate to such equity of the creditor.

Although a master's report is not final, it will not, ordinarily, be set aside, unless it appears affirmatively that the master was not warranted in his findings by the evidence, or has erred as to the law applicable to the case.

The conditional vendee of personal property had no attachable interest therein under the statute of 1854, No. 12, when none of the purchase money thereof had been paid by him. **BARRETT, J.**

**APPEAL** from the court of chancery. The questions in this case arose on exceptions to the master's report, and the facts are fully stated in the opinion. The court of chancery, at the December term, 1865, in Windsor county, **BARRETT**, Chancellor, *pro forma*, overruled the exceptions, accepted the report, and dismissed the bill. Appeal by the orator.

*Washburn & Marsh* and *Henry Whittaker*, for the orator.

*Andrew Tracy* and *Peck & Fifield*, for the State Bank and Sanderson Brothers & Co.

The opinion of the court was delivered by

**WILSON, J.** This bill is brought to render available the orator's attachment of property, of which the Union Arms Company were (as held when the case was before this court in 1863) conditional vendees. The property originally belonged to the Robbins & Lawrence Company. That company, on the 8th of March, 1855, entered into a contract with Fox, Henderson & Co., to manufacture and deliver to them 25,000 Minie rifles. The Robbins & Lawrence Company entered upon the performance of the aforesaid contract, and, for the purpose of facilitating the purchase of materials and the work to be performed in order to a completion of the manufacture and delivery of the rifles at the earliest practicable period, Fox, Henderson & Co. made large advances to the Robbins & Lawrence Company, insomuch that there remained due to Fox, Henderson & Co., on account of such advances, on the 28th of October, 1856, at the time the Robbins & Lawrence Company failed in business and became insolvent, about eighty thousand dollars, which had not been repaid to them by the deliveries

of rifles in pursuance of the provisions of the contract. The Robbins & Lawrence Company only partially performed their contract, when they failed, and became hopelessly bankrupt. At the time of their failure, they were deeply indebted to the State Bank, and Sanderson Brothers & Co., and they attached the property of the Robbins & Lawrence Company, at Windsor, subject to two prior attachments, one of them in favor of the Merchants' Bank, Boston, and the other attachment was in favor of the Ashuelot Bank, of Keene, N. H. In February, 1857, the Union Arms Company was organized as a corporation under the laws of the state of Connecticut, and its stockholders consisted of persons who were creditors of the Robbins & Lawrence Company, and it appears that stock was allotted to them in representation and satisfaction of their debts. The main object proposed to be accomplished by the organization of this corporation, was the resumption and completion of the work on the contract for the 25,000 rifles, originally made by the Robbins & Lawrence Company. It is evident that it was the intention of the Union Arms Company, at the time of its organization, and necessary to a resumption of the work they proposed to undertake, to secure the purchase, or the use at least, of the machinery, tools, and stock, of the Robbins & Lawrence Company, which were then under attachment by their creditors, and to that end, the Union Arms Company, on or about the 1st of July, 1857, obtained a conveyance of the property, subject to all existing incumbrances, and thereupon made application to Fox, Henderson & Co. for a renewal of the contract for the manufacture of the rifles, and for liberty to assume and complete the same. On the 30th of July, 1857, the Union Arms Company made an agreement with Fox, Henderson & Co., in and by which agreement the Union Arms Company adopted, and bound themselves to the performance of, the contract made by the Robbins and Lawrence Company with Fox, Henderson & Co. for the manufacture of the 25,000 rifles, subject only to such modifications as were mutually agreed upon and made therein. The Union Arms Company, in and by their agreement of the 30th July, 1857, promised and agreed to and with Fox, Henderson & Co., that they the Union Arms Company would, on or before the

first day of October, 1857, pay, or otherwise compromise or settle with, all persons whomsoever holding liens, charges, or attachments, on the property, except mortgages, so as to acquire and retain full and undisturbed possession of the premises whereon the manufacture had theretofore been carried on, and of the machinery and stock in trade necessary to the carrying on the same, in order to the fulfillment by them, the Union Arms Company, of their contract with Fox, Henderson & Co.

The State Bank and Sanderson Brothers & Co. having obtained judgments in the suits upon which the property of the Robbins & Lawrence Company was attached on the 28th of October, 1856, the personal property of that company at Windsor, was sold by the sheriff on the executions issued on the aforesaid judgments, at a public sale on the 20th of August, 1857, to the State Bank and Sanderson Brothers & Co., who jointly purchased the same for the protection of their own debts. The rights which the Union Arms Company previously had in the property, were extinguished by the sheriff's sale, and by that sale the State Bank and Sanderson Brothers & Co. acquired title to the same. Under these circumstances, it became necessary for the Union Arms Company to purchase this property of the State Bank and Sanderson Brothers & Co., or make some arrangement with them in relation thereto, in order to commence and go on with the manufacture of the rifles in pursuance of their contract with Fox, Henderson & Co. The State Bank and Sanderson Brothers & Co., on the 21st Sept. 1857, relying upon the representations made to them by the Union Arms Company, that the latter company had been organized with sufficient capital to carry out the contract with Fox, Henderson & Co., that the contract was a profitable one, that the company had the means to carry out the contract without embarrassment, and to remove all liens prior to those of the State Bank and Sanderson Brothers & Co., bargained with the Union Arms Company to sell to them the property in question. The Union Arms Company, in consideration of the proposed sale, executed their note to the State Bank and Sanderson Brothers & Co. for the sum of \$39,324.07, with interest, payable on demand; and they executed their note to Sanderson Brothers & Co. for the sum of \$12,-

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968.03, with interest, made payable on demand, which sums represented the indebtedness of the Robbins & Lawrence Company to the State Bank and Sanderson Brothers & Co. respectively. The contract of sale, among other things, provided that the title to the property should not pass, but should be and remain in the State Bank and Sanderson Brothers & Co., until the full and complete payment of both of said notes, and of the debt due from the Robbins & Lawrence Company to the Ashuelot Bank, with interest and costs, and until the full performance of the other conditions named in said contract. The Union Arms Company, having failed to settle with all persons holding liens on the machinery and stock in trade at Windsor, or to acquire title thereto; having failed to acquire possession of the aforesaid machinery and stock in pursuance of their contract of July 30, 1857, with Fox, Henderson & Co., and having failed to perform their contract of September 21st, 1857, with the State Bank and Sanderson Brothers & Co., and being unable to resume the manufacture and delivery of rifles without some modification of the latter contract, made their supplementary agreement with Fox, Henderson & Co., in and by which, among other things, it was agreed that the Union Arms Company should resume the manufacture and delivery of the rifles within two weeks from the date of the aforesaid supplementary agreement. The State Bank and Sanderson Brothers & Co., on the 19th of Oct., 1857, in and by their supplementary agreement with the Union Arms Company, among other things, so far modified the terms of their agreement of Sept. 21st, 1857, that the Union Arms Company, upon the conditions therein named, were permitted to go forward and use the machinery, stock and tools, bought at sheriff's sale by the State Bank and Sanderson & Co., August 20, 1857; but this supplementary agreement does not affect the former contract in respect to the conditions on which the title to the property should pass. Some further notice of the provisions of these contracts will become necessary in our discussion of other branches of the case. The Union Arms Company, having thus effected arrangements in order to commence the work, on or about the 1st of November, 1857, did commence the manufacture and delivery of rifles, and continued the business, under

all the embarrassments incident to the prosecution of a large and unprofitable work without adequate means, until the 3d of April, 1858, when they ceased doing business, having only partially performed their contract with the orator. The State Bank and Sanderson Brothers & Co. then took the property and continued the work, for the protection of their claims, to the last of June, 1858, and after that, from time to time, disposed of it, holding the proceeds to apply in payment of their necessary expenses and disbursements, and in payment of the notes given by the Union Arms Company for the property.

On the 21st of June, 1858, the orator (assignee of Fox, Henderson & Co.) attached the property as the property of the Union Arms Company, while the State Bank and Sanderson Brothers & Co. were in possession of it. He subsequently recovered judgment against the Union Arms Company for their neglect to perform the Robbins & Lawrence Company contract with Fox, Henderson & Co. The orator, within ten days after the making of his attachment, commenced this bill, for discovery, account and relief, on the ground of his lien on the property under the attachment. The bill avers, among other things, that the property received and held by the State Bank and Sanderson Brothers & Co., and the avails thereof by them received, and the money by them received under the several contracts between them and the Union Arms Company, are more than sufficient to pay and discharge the full amount of the promissory notes, and all other sums of money for which the State Bank and Sanderson & Co. hold the property. The orator also alleged in his bill that if any part of the purchase money remained unpaid to the State Bank and Sanderson Brothers & Co. at the time of the attachment, no payment or tender of payment could, under the circumstances, be made until the amount was ascertained by the intervention of a court of equity, and to this end the orator prayed for an accounting between the parties.

The answers deny that the State Bank or Sanderson Brothers & Co. have received any money or other property of any kind, with which to pay any part of the notes given for the property. They aver that both notes, together with the interest thereon, re-

main wholly unpaid; that the State Bank and Sanderson Brothers & Co. are the absolute and sole owners of the property, and deny that the Union Arms Company have any interest therein.

The bill was taken as confessed, as against the Union Arms Company. This cause was before this court at the February term, 1863, and was then heard upon bill, answers, and proofs, touching the question whether the Union Arms Company had any attachable interest in the property at the time of the orator's attachment, and this court then decided, (as reported in *Rowan v. The Union Arms Company et al.* 36 Vt. 124): 1st. That the property was sold to that company by the State Bank and Sanderson Brothers & Co. by a conditional sale, the payment of the purchase money being, by the contract of sale, made a condition precedent to the transfer of the title. 2d. That the property, in pursuance of the contract of sale, passed into the possession of the Union Arms Company. 3d. That a portion of the money to be paid under the contract was paid prior to the orator's attachment. 4th. That the Union Arms Company had an attachable interest in the property, under the provisions of the act of 1854, (No. 12); that the orator, by his attachment of the 21st of June, 1858, acquired a lien upon the property, and the right to assert, in equity, in respect to so much of the property as was on hand at that date, any claim which the Union Arms Company could assert to it. 5th. That where, as in this case, the difficulty to pursuing the legal remedy, consists of a claim to the property attached, by the conditional vendors to the same, and there is a dispute as to how much of the purchase money, if any, is unpaid, so that it is necessary for an accounting to be made by the vendors to determine what is so due, and a bill in chancery is brought by the attaching creditor to obtain such accounting, within ten days after the attachment is made, it cannot be urged, as a bar to the accounting, that the attaching creditor did not pay, or tender to the vendors, the residue of the purchase money remaining unpaid, within ten days after the attachment, as required by the statute; as only the accounting can determine whether the conditional vendors have, or had at the time the property was attached, any claim upon the property attached, which it was necessary for the at-

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taching creditor to discharge by payment or tender. The case was remitted to the court of chancery, with a mandate, directing an interlocutory decree that the State Bank and Sanderson Brothers & Co. account before a master for their receipts and disbursements under their contracts with the Union Arms Co. of the 21st of September and 19th of October, 1857; and that upon the coming in of the master's report, the cause should be proceeded with in the usual course to a final decree. The cause was referred to a master, before whom the defendants rendered their account. The master made and returned to the court of chancery a very elaborate report in the premises, which was accepted, and, upon the facts reported, the chancellor decreed, *pro forma*, that the orator's bill should be dismissed; from which decree the orator appealed; and the cause is now before this court upon exceptions taken by the orator to the report of the master. Various points are taken and urged, which will be considered so far as may be necessary in deciding the case.

It is claimed by the defendants that the Union Arms Company had no attachable interest in the property, and that the orator acquired no lien upon it by his attachment. When this cause was before the supreme court in 1863, it was held that the sale of the property was conditional; in which the title does not pass from the vendor, nor vest in the vendee, until satisfaction or performance of the condition; and it became material to determine, before ordering an accounting, whether, at the time of the attachment, there had been a satisfaction of such of the conditions required by the statute, as to enable the orator to attach the property in question as the property of the Union Arms Company. This matter was raised by the bill, answers, and proofs, and was in dispute on the former trial of the cause before this court. It was then found and decided, that, after deducting the interest on the advances and expenses, from five to ten thousand dollars had been received by the State Bank and Sanderson Brothers & Co., to apply in payment of their notes; consequently, the subject is not open for revision. The defendants, in support of this ground of defence, rely upon the fact found and reported by the master, that, at the time of the attachment, the excess of disbursements



over receipts, was more than \$40,000, thus increasing the debt that amount over and above the notes the Union Arms Company were to pay before they had any claim on the property. But the contract of September 21st, 1857, provided that all parts of guns, and all materials which should be mingled with the property at Windsor, should, as to the sales and proceeds thereof, be subject to the provisions applied to the property at Windsor in this contract. The theory of the defence has been, and is, that the whole property which came into the hands of the defendants under the contracts of September 21st and October 19th, 1857, together with the new materials purchased by them, after they resumed possession for the purpose of closing up the manufacture and business, was pledged, mortgaged, or otherwise held, for the payment of their disbursements and the notes, and upon this ground the defendants disposed of the property.

It is insisted by the orator that the acts of the defendants in assuming the possession and in the disposition of the property, were wrongful, and that the account should have been taken against the defendants as wrong doers, with all the liabilities incident to that relation. It is urged by the orator's counsel in support of this proposition, that the contracts of Sept. 21st and Oct. 19th, 1857, constitute an agreement that the notes executed by the Union Arms Company to these defendants, should be paid by installments, at the respective times the guns should be delivered, notwithstanding they were made payable on demand; and that there was nothing due to the defendants at the time they took the property. The contract of Sept. 21st, 1857, provided that all manufactures, transfers, and sales by the Union Arms Company, of any of the property mentioned in this contract, and of property arising in whole or in part from the avails or proceeds thereof, should be made with the consent of the agent of these defendants, that such agent should receive all the proceeds of the sales and transfers of the property, and so much thereof as in his best judgment was not necessary for the Union Arms Company to have for the payment of laborers and mechanics, and for the purchase of stock, he should apply to the payment of the notes to the State Bank and Sanderson Brothers & Co. in

proportion to the amount due on each. It is evident that the parties to this contract understood that the property would, by reason of use, and from other causes, be liable to depreciate in value ; and it is very clear that its provisions were intended to aid the Union Arms Company in the performance of their contract with Fox, Henderson & Co., and to furnish additional security to the State Bank and Sanderson Brothers & Co. for the payment of the notes given for the property. This contract, in effect, entitled the Union Arms Company, if they performed the other stipulations therein contained to be performed by them, to receive of these defendants such portion of the proceeds of the sales and transfers as should be necessary to enable that company to prosecute the work contemplated in their contract with Fox, Henderson & Co. But there is nothing in the contract which shows that the parties to it intended to alter or vary the time of payment of the notes ; they still remained payable on demand. That portion of the proceeds of the sales and transfers arising from the property embraced within the terms of the contract, which might be applied to the payment of the notes, was in the nature of collateral security, and the defendants were at liberty to collect the notes from other means of the Union Arms Company, or to pursue their collateral remedy according to the terms of the agreement, or to pursue both remedies until they had obtained full satisfaction of their debts. *Root v. Lord*, 23 Vt. 568. It is claimed by the orator that this contract was not satisfactory to him and the Union Arms Company ; and it would seem that the orator was, by the Union Arms Company, induced to believe that the principal, if not the only, hindrance to the resumption and performance by them of their contract with the orator, might arise from their being deprived of the use of the property at Windsor, contained in the conditional sale, and for the purpose of obviating this objection, the orator required the Union Arms Company to procure some modification of the contract, by means of which they might be secured the right to use the property, and resume and continue deliveries of rifles under their contract with the orator, without interruption from the State Bank and Sanderson Brothers & Co. To this end, the supplementary agreement between the Union Arms

Company and these defendants, of October 19th, 1857, was entered into, by which the contract of September 21st was modified in several essential particulars. The agreement of October 19th, 1857, secured to the Union Arms Company the right to use the property at Windsor for the purpose of resuming and continuing the manufacture and deliveries of rifles under their contract with the orator, so long as they should keep their several agreements in the premises. This agreement did not make the notes of the Union Arms Company to the State Bank and Sanderson Brothers payable by installments; they still remained payable on demand. But the provisions of the contract of October 19th, do constitute an agreement that the payments arising from such collateral security should be made from time to time, when the rifles were delivered, and that the State Bank and Sanderson Brothers & Co. should not, in the collection of the notes according to their tenor, pursue or interfere with the property in question, unless the Union Arms Company failed to perform the agreements under which they were permitted to use the aforesaid property.

This leads us to consider whether the Union Arms Company did so far fail to perform their agreements of Sept. 21st and Oct. 19th, 1857, as to authorize or justify the State Bank and Sanderson Brothers & Co. in taking the property in the manner disclosed by the proofs in the case. It appears that, on or about the 1st of November, 1857, the work of manufacturing the rifles, under the contract of the Union Arms Company with the orator, was commenced in the name of the Union Arms Company, but it soon became apparent that they had no adequate means for carrying on the work; and it was prosecuted principally with the means and at the expense of the State Bank and Sanderson Brothers & Co., until the 3d of April, 1858. From the time the work commenced, to the 3d of April, the disbursements of the State Bank and Sanderson Brothers & Co. for laborers and mechanics, for stock and other necessary expenses in the prosecution of the work, and for payments of debt, which the Union Arms Company agreed, but failed, to pay, and the receipts of the State Bank and Sanderson Brothers & Co. were as follows, viz.: Their disbursements in the month of November, 1857, were \$2,811.58, during which month

they received nothing to apply towards their disbursements, nor on their notes. In December, their disbursements were \$9,215.77, and their receipts were \$8,838.89; excess of disbursements over their receipts to January 1st, 1858, \$3,188.46. In the month of January, 1858, their disbursements were \$11,269.34, and their receipts were \$13,299.44; excess of disbursements over receipts to February 1st, 1858, \$1,158.36. In the month of February, 1858, their disbursements were \$11,162.18, and their receipts \$10,701.22; excess of disbursements over receipts to March 1, 1858, \$1,619.32. In the month of March, 1858, their disbursements were \$15,602.71, and their receipts \$4,398.89; excess of disbursements over receipts to April 1st, 1858, \$12,823.14. From April 1st to April 3d, inclusive, their disbursements were \$7,820.07, and their receipts were \$5,291.00; excess of disbursements over receipts on the 3d of April, 1858, when the work stopped, \$15,352.21.

It is established by satisfactory proof, that on the 3d day of April, 1858, at the time the State Bank and Sanderson Brothers & Co. took possession of the property, the notes executed to them by the Union Arms Company, remained wholly unpaid. But it is claimed by the orator that the State Bank and Sanderson Brothers & Co. reserved to themselves the right only, "to stop all use and sales of the property by the Union Arms Company on the first, or any subsequent violation of their agreement, touching the sales and proceeds thereof," and the orator insists that inasmuch as the State Bank and Sanderson Brothers & Co. had received the entire proceeds of the sales and transfers of the property, the Union Arms Company, at the time they were deprived of the property, had not broken their contract, and that the assumption of the property by these defendants, was wrongful. We understand this position of the orator is, that the agreement of Oct. 19th contains no condition, express or implied, upon the performance of which by the Union Arms Company their right to use the property depended, except that "touching the sales and proceeds thereof"; and in order to determine whether this conclusion should be admitted, some further consideration of the agreement becomes necessary. The agreement of October 19th contains, among other things, the

following stipulations, viz., "That the Union Arms Company may go forward and use the machinery, stock, and tools, bought of the sheriff of Windsor, Vt., by the party of the first part (the State Bank and Sanderson Brothers & Co.), August 20th, 1857, and may forward from Windsor to Hartford, and make up and deliver to the purchasers thereof, any portions of such stock, from time to time, as the same shall be manufactured and ready for delivery—provided all sales of such property are made by said Union Arms Company with the consent of the agent of said party of the first part, and the proceeds thereof are paid to him according to the contract signed by the said party of the first part, bearing date Sept. 21st, 1857, to which this is annexed; *the State Bank and Sanderson Brothers & Co. reserving to themselves the right to stop all use and sales of said property by said Union Arms Company, on the first, or any subsequent, violation of the said agreement, touching the said sales and proceeds thereof.* Also, all rifles accepted by the war department of the British government may be delivered to said government without consent of said agent; provided said proceeds are all paid over to said agent for said State Bank and Sanderson Brothers & Co." This agreement contains a further stipulation, "that all proceeds of sales of any of said property shall be paid over to the agent of the State Bank and Sanderson Brothers & Co." It should be observed that, at the time this agreement was made, the Union Arms Company had assumed the contract of the Robbins & Lawrence Company for the manufacture of the 25,000 rifles, and had agreed with Fox, Henderson & Co. that the Union Arms Company would pay all claims, or otherwise compromise and settle, on or before the 1st of October, 1857, with all persons whomsoever holding liens, charges, or attachments, on the property (except mortgages), so as to acquire and retain full and undisturbed possession of the premises whereon the manufacture had been carried on, and of the machinery, stock in trade, and tools, necessary to the carrying on thereof, in order to the fulfillment by them, the Union Arms Company, of their contract with Fox, Henderson & Co.

The Union Arms Company had failed to make any compromise or settlement, or to acquire possession of the property; and by

their supplementary agreement with the orator, of October 19th, 1857, the time within which they should acquire the possession of the property, and commence the manufacture and delivery of rifles, under their contract with him, was extended two weeks from the date of the aforesaid supplementary agreement. The contracts thus assumed by the Union Arms Company, required them to manufacture and deliver to the orator, 800 rifles per month, in and for the months of October, November, and December, 1857, and January, 1858, and to make deliveries of 1000 rifles per month, for every month thereafter, while the aforesaid contracts should be pending; the same to be the least amount of deliveries per month; which contracts were in full force at the time of the making of the agreement between the Union Arms Company and these defendants, October 19th, 1857. No question is made but that the agreement between the Union Arms Company and the orator, and the agreement between the Union Arms Company and the State Bank and Sanderson Brothers & Co., were made in good faith, and with the expectation that they would be strictly observed and performed. What, then, did the Union Arms Company, the State Bank, and Sanderson Brothers & Co., *intend and understand* by the stipulation or clause in their agreement of October 19th, which allowed the Union Arms Company *to go forward and use the machinery, stock, and tools*? Considering this stipulation or clause, in connection with other stipulations in the agreement, in the light of surrounding circumstances, and with a view to the obvious and admitted intention and understanding of the parties, we think the right of the Union Arms company "to go forward and use the machinery, stock, and tools," or to retain the possession of the same, depended upon an implied condition that they would *go forward* and use them, and manufacture and deliver rifles, within the respective times stipulated in their contract with the orator. It is evident that the Union Arms Company was allowed to use the property, with the understanding, and upon condition, they would perform their contract with the orator, and not in view of profits which might arise from the manufacture of other work. The magnitude of the work which the Union Arms Company had engaged to perform, and the short-

ness of the time in which it was to be completed, forbid the idea that the agreement was entered into with much, if any, reference to the use of the property for ordinary custom work, or in view of proceeds which could be realized therefrom to the State Bank and Sanderson Brothers & Co. If the Union Arms Company had been able to furnish, and had furnished, the means for prosecuting the work, without the aid of the State Bank and Sanderson Brothers & Co., and had manufactured and delivered the number of rifles each month they stipulated to manufacture and deliver, the proceeds thereof, which would have been realized by these defendants, prior to the 1st of June, 1858, would have paid the notes to the State Bank and Sanderson Brothers & Co., and have redeemed the property.

The gross proceeds of the sales and transfers, from the time the work commenced to the 3d of April, 1858, were nearly equal to the amount of the notes to the State Bank and Sanderson Brothers & Co.; but those proceeds, together with a large sum in addition, were necessary to re-imburse the State Bank and Sanderson Brothers & Co., for money paid out, and for liabilities incurred, by them, in the manufacture of the rifles. The proofs clearly establish the fact, that the Union Arms Company *did not go forward* and use the property within the meaning of their agreement with the State Bank and Sanderson Brothers & Co. of October 19th, but, on the contrary, wholly neglected to provide means for prosecuting the work, and relied upon the State Bank and Sanderson Brothers & Co. for means, which they had not promised, and were under no obligations to furnish.

The evidence leaves no doubt that the State Bank and Sanderson Brothers & Co. acted in good faith in their efforts to aid the Union Arms Company in performing their contract with the orator. It appears that, so long as the price of the rifles continued equal to the cost of manufacture, the Union Arms Company was allowed the advantage of the contract, notwithstanding they did not furnish the means, nor prosecute the work, according to the agreement and understanding of the parties. But when the price of the rifles was reduced below the cost of manufacture, the State Bank and Sanderson Brothers & Co. did not deem it for their in-

terest to make further investments, in order to the performance of a contract, in respect to which they had incurred no legal or moral obligation, nor to allow the Union Arms Company to make further use of the property at a loss to these defendants.

It is further claimed by the orator that, under the supplementary agreements of October 19th, 1857, he acquired such interest in the possession and use of the property by the Union Arms Company, as to entitle him to require that the defendants should absolutely refrain from any interruption of the performance of the contracts by the Union Arms Company, except for the single cause stated in the defendants' agreement; and it is further claimed by the orator, that he was, by reason of the defendants' agreement, induced to yield rights and grant privileges to which he would not otherwise have consented. It is clear that there is no privity of contract between the orator and these defendants. How far the orator was induced to yield rights or grant privileges to the Union Arms Company, by reason of their agreement with the State Bank and Sanderson Brothers & Co., does not appear; and, under the circumstances, is not important in deciding the case. The orator had full knowledge of the circumstances under which that agreement was entered into, and of its provisions. The presumption is, that the orator duly considered the provisions of the agreement, their advantages and disadvantages to the Union Arms company, in deciding how far that agreement would enable the Union Arms Company to perform their contracts with the orator. There is nothing in the agreement calculated to deceive or mislead the orator in respect to any contract he might have desired to make with the Union Arms Company. It expressly provides, that all the proceeds of the sales and transfers should be paid to the State Bank and Sanderson Brothers & Co., and the Union Arms company could not, by the terms of this agreement, appropriate any portion of them for the payment of laborers, mechanics, or stock, nor for any purpose except that named in the agreement. The orator must have understood that the Union Arms Company would, under that agreement, be required to furnish the means for prosecuting the work, which would require a large and available capital; and, in respect to



the ability of the Union Arms Company to furnish it, the orator took the risk, at least to the extent of his contract with them. The orator did not guaranty that the Union Arms Company should furnish the means for manufacturing the rifles ; nor did he furnish security to the defendants for the payment of the rifles. The defendants did not guaranty that the Union Arms Company should perform their contract with the orator, nor agree to furnish capital for that purpose ; and upon what principle of law or equity it can be claimed that the consent of the orator was necessary, to entitle the defendants to take advantage of the breach by the Union Arms Company, of their agreement with the defendants, is not shown. We assume that the orator, in the making of his contract with the Union Arms Company, regarded the defendants' agreement with them, as subject to the conditions therein expressed and implied, and liable to become forfeited by reason of non-performance by the Union Arms Company ; and it is obvious that the State Bank and Sanderson Brothers & Co. cannot be affected, or in any manner prejudiced, by reason of any importance which the orator attached to the agreement, not justified by its provisions. It appears that, during the time in which the manufacture of the rifles was carried on in the name of the Union Arms Company, the State Bank and Sanderson Brothers & Co., in order to protect their interests, furnished all, or nearly all, the means for prosecuting the work ; and, in view of its ultimate completion by the Union Arms Company, a large amount of stock, necessary for manufacturing the rifles, was purchased by the State Bank and Sanderson Brothers & Co., which remained on hand at the time the price of the rifles was reduced below the cost of manufacture ; in the disposition of which stock, the State Bank and Sanderson Brothers & Co. were liable to sustain damage ; and we think it would be unjust to require them to sustain the loss resulting from the breach of a contract to which they were neither a party nor privy.

It is conceded by the orator that the Union Arms Company relied principally upon the performance by them of their contract with him, and upon the proceeds of the rifles, for making payment to the State Bank and Sanderson Brothers & Co., of their claims,

and the fact is conclusively established that the Union Arms Company had no other means, nor does it appear that they expected to be able to obtain other means, for making such payment.

The correctness of the views entertained by the court, and herein expressed, in respect to the interpretation and meaning of the agreement between the Union Arms Company and these defendants, of October 19th, 1857, may be illustrated by considering some of the consequences which would be likely to result from a different rule. Suppose the Union Arms Company to have commenced the use of the property under their agreement with the defendants, and the work of manufacturing the rifles under their agreement with the orator, and to have furnished the means and manufactured twenty-five rifles per month, or other work equivalent, and the proceeds of the sales to have been received by the State Bank and Sanderson Brothers & Co., which would not pay the annual interest on their debts; no one, we think, would insist that such limited use of the property would constitute a performance by the Union Arms Company of their contract with these defendants; nor would it be contended that the language of the agreement required an interpretation which might render it necessary to keep the agreement on foot during the natural lives of the parties. If it be true, as claimed by the orator, that the State Bank and Sanderson Brothers & Co. had no right "to stop the use and sales of the property" by the Union Arms Company, except for violation by them of their agreement "touching the sales and proceeds thereof," how would the matter stand if the Union Arms Company had manufactured only one rifle per month, and allowed the defendants to direct the sale and receive the proceeds thereof; would it be claimed that such use of the property would constitute a performance of the stipulation which allowed the Union Arms Company "to go forward and use the property and manufacture rifles"? Clearly not. But it might be said that the Union Arms Company would not, in either of the cases supposed, be at liberty to retain the property beyond the time limited for the performance of their contract with the orator. However this might be if the orator did not extend the time of its performance, the proposition of the orator is none the less unsound, for neither

party could, under such rule of interpretation, derive any benefit from the provisions of the agreement. Suppose the Union Arms Company had taken possession of the property, but failed to manufacture any rifles or other work from which these defendants could derive any proceeds in payment of the notes, would such use or non-user of the property constitute a going forward with the work by the Union Arms Company, and a performance of their contract with the defendants? Most certainly not; and this is substantially what the Union Arms Company did, or failed to do, or in other words, the Union Arms Company, from the time the work commenced to the 3d of April, 1858, and thereafter, wholly failed to furnish means and go forward and use the property, under circumstances which would enable the defendants to apply the proceeds of sales upon their notes, as contemplated by their agreement; but, on the contrary, the failure of that company to perform their agreement, largely increased their indebtedness to the defendants.

The bankruptcy of the Union Arms Company, from the time the work commenced, and their total inability to perform their contract with the orator, are fully established by the evidence. Their neglect, from the beginning, to furnish the necessary capital with which to carry on the business, is not accounted for, nor has any attempt been made to account for it, except on the ground of their bankruptcy.

The letter of the president of the Union Arms Company, under date of March 30, 1858, in which that company solicited of the orator an extension of the order originally given to the Robbins & Lawrence Company, contains unmistakable evidence of the inability of the company to perform the existing contract, and of their determination to make no further effort to perform it, except upon the condition suggested. The Union Arms Company in that letter say that, "satisfactory as the progress thus made has been, the directors of the Union Arms Company cannot conceal from themselves that, with all their efforts, difficulties are likely to arrive in the further prosecution of the work, by reason of the augmented scale of deductions to take place agreeably to contract. Hitherto the stipulated rate has allowed them a cash receipt on each rifle de-

livered, of about \$9.00 ; under the scale about to come into operation, they will receive only between five and six dollars per arm. The cash received, at this diminished rate, will not suffice to provide for current expenses of workmen, and resort must now be had to raise money from stockholders of the Union Arms Company for that purpose, this money going in effect to repay advances made to the Robbins & Lawrence Company before their failure, and of which the Union Arms Company have, in the further prosecution of the work, no practical benefit. This state of things, will necessarily render the working out of the contract a matter not merely unprofitable, but productive of actual pecuniary loss to that body. You will therefore see at once how this fact must necessarily bear upon any application made by the directors to the stockholders, who for the most part hold paid up shares allotted in satisfaction of debts against the Robbins & Lawrence Company, to provide the further capital which will now be necessary, and how difficult, if not impossible, that task must be, at a time when the investment of capital in similar undertakings has lately received, and still experiences, so severe a check."

It was urged by the orator's counsel on the argument of the case, that there was not in fact any such pecuniary inability on the part of the Union Arms Company to carry out their contract, as has been relied upon by the defendants as their justification for assuming the possession and absolute disposition of the property at the time they so interfered. In support of this proposition, our attention has been called to the property acquired by the Union Arms Company prior to the 3d of April, 1858, and to property owned by them, or in which they had an interest, from the 3d of April to the time of the orator's attachment. Without stopping to inquire what the Union Arms Company might have done if their property had been free from incumbrance, and available and sufficient for the prosecution and completion of the work, we deem it sufficient to say, upon this point, that their property was, by their own free act, encumbered to such extent that they had no power to control it as against these defendants, and it is not shown or even claimed by the orator that the Union Arms Company had, independent of the right of the defendants, any adequate and

available capital for the prosecution of the work. It is fully established by the testimony of Cutter, Robbins, and others, that the Union Arms Company could, in the further prosecution of the work, derive no practical benefit, that they could not go on with the work, and that they did not desire to involve themselves or their friends any deeper in debt, by further effort to perform a second-hand and worthless contract—a contract which had become worthless in consequence of advances made to, and received by, the Robbins & Lawrence Company.

It is not shown or claimed that the Union Arms Company were in any manner discharged or released from their obligation to furnish capital and go forward with the work, nor were they, prior to the 3d of April, 1858, in any way or manner interrupted by the defendants in the use of the property. The circumstances under which the defendants permitted or suffered the Union Arms Company to retain the nominal use of the property, and the work to continue in their name to April 3d, 1858, constitute no valid answer or ground of defence to the alleged breach of their contract.

The neglect of the Union Arms Company, for so long a period of time, to provide the necessary capital for prosecuting the work, in consequence of which the State Bank and Sanderson Brothers & Co. were compelled to furnish the means, or perhaps sustain a greater loss, thereby rendering it necessary, and giving the right, to apply the proceeds of sales and transfers in a manner and for purposes not contemplated by the terms of the agreements of Sept. 21st and Oct. 19th, 1857, was, on the part of the Union Arms Company, a breach of their agreements with the defendants, which gave the defendants the right to take the exclusive possession of the property, and to dispose of it for the purposes for which it was encumbered. We think it is quite clear that the Union Arms Company consented that these defendants should take possession of the property. The causes of the failure of the Union Arms Company to commence the work, as contemplated by their agreement; their inability before and on the 3d day of April, 1858, to continue the work; the fact that, in the further prosecution of the work, they could derive no practical benefit, but would incur great

pecuniary loss ; the claims of the defendants on the property ; the taking possession thereof by them under their title, and without objection from the Union Arms Company ; the exclusive use and disposition of the property by the defendants, within the knowledge of, and without objection from, the Union Arms Company ; leave no doubt in respect to this question.

Nor are the defendants tortfeasors as regards the non-delivery of the first class guns to the British government. The relation of the Union Arms Company and these defendants, was that of debtor and creditor ; the interest of the latter in the contract between the orator and the Union Arms Company, was such as usually exists and is manifested by the creditor in the successful prosecution of an enterprise by his debtor, which may afford means for payment. The interests of the defendants, and the protection of those interests, might have required them to furnish funds for the prosecution of the work, so long as the price of the rifles would justify the belief that they should be able to reimburse themselves for such expenditures and also obtain some part of their notes. The act of the defendants in the furnishing of the funds, was voluntary, so far as it related to the orator ; and as to the Union Arms Company, it became necessary, in consequence of their bankruptcy and their breach of contract. But there is no evidence in the case that the defendants undertook to carry on the contract of the Union Arms Company, or that the defendants incurred any liability in respect to the delivery or non-delivery of arms to the British government.

The bill alleges that the State Bank and Sanderson Brothers & Co., in addition to the machinery, stock, and other property purchased by them at the sheriff's sale, and by them held under the contracts of Sept. 21st and October 19th, 1857, had and still hold large amounts of personal property and securities, or the avails thereof, which they received from the Robbins & Lawrence Company, or from Robbins & Lawrence, previous to the sheriff's sale, as collateral security for the debts severally due to them from the Robbins & Lawrence Co., for which they ought to account towards the amount due them upon the notes executed to them by the Union Arms Company, before the application thereon of any part of

the avails of the stock, machinery, and other property mentioned in the contracts of Sept. 21st and October 19th, 1857.

The State Bank, in their answer, deny that they have in their possession any personal property or other security, or the avails thereof, to hold for any purpose, received from the Robbins & Lawrence Company, or from Robbins & Lawrence, before or since the sheriff's sale, excepting that, before the sheriff sale, the Robbins & Lawrence Company delivered to the State Bank 200 Minie rifles of the second class, which, when sold, to the extent of the avails thereof, the State Bank offer to apply on their debt.

The defendants, Sanderson Brothers & Co., deny that they, or either of them, hold, in addition to the property bid off at the sheriff's sale, any personal property or securities which they received from the Robbins & Lawrence Company, or from Robbins & Lawrence, prior to the sheriff's sale, or at any other time, as collateral security for their debt against the Robbins & Lawrence Company, or for any other purpose, excepting the worthless draft mentioned in their answer, and a box of 20 rifles received of the Robbins & Lawrence Company, which these defendants allege were of little or no value, and which were sent back to Windsor, and mingled with the property there. They also admit the receipt of \$128, on the 20th of Nov. 1857, for a box of pistols sold by them, and which were received from the Robbins & Lawrence Company prior to the sheriff's sale; and excepting as herein before mentioned, they deny that they, or either of them, ever received from the Robbins & Lawrence Company, or from Robbins & Lawrence, any thing as security for, or to apply towards, their debt against the Robbins & Lawrence Company, or in any other way, that was not applied upon their debt, and fully accounted for before the rendition of their judgment against the Robbins & Lawrence Company.

It does not appear that the defendants hold any property, or that they, or either of them, received any collateral security from the Robbins & Lawrence Company, or from Robbins & Lawrence, which should apply on their debts against the Union Arms Company, excepting the items admitted in their answers.

It appears that the property on hand on the 3d of April, 1858, of which the State Bank and Sanderson Brothers & Co., on that day, took the exclusive possession, consisted of property originally purchased by them, of property which had been purchased by them subsequent to the original purchase and prior to the 3d of April, 1858, and of such property of the Union Arms Company as had been intermingled with that purchased by the State Bank and Sanderson Brothers & Co. It is contended by the orator that the contract of September 21st, 1857, gave the State Bank and Sanderson Brothers & Co. the right to claim the entire avails of any rifles assembled by the Union Arms Company from parts partly existent or manufactured at Windsor, and partly at Hartford, under the contracts, and while those contracts were in the course of performance; but it is claimed by the orator that the contract did not give the defendants the right to assume possession themselves of any part of the materials at Hartford, or to enter the factory there, or to make use of the machinery, or to assemble a single gun at the Hartford factory. This proposition of the orator amounts to this,—that so long as the Union Arms Company continued in the performance of their contracts with the defendants, the defendants had a right to all the proceeds of the property at Hartford, as well as at Windsor, but when the Union Arms Company failed to perform their contract with the defendants, then the defendants lost, not only this right, but their lien or security under the contracts, on the property so intermingled. We are not prepared to admit the orator's conclusion, for it would allow the Union Arms Company to take advantage of their own wrong. In order to create a lien in favor of the defendants on the property of the Union Arms Company, by reason of the intermixture in pursuance of the contracts of Sept. 21st and Oct. 19th, 1857, it was not essential whether the property was intermingled at Windsor or Hartford, or at both places. The contract of Sept. 21st, in express terms, provided that all parts of guns and all materials which should be mingled with the property at Windsor should, as to the sales and proceeds thereof, be subject to the provisions applied to the property at Windsor in this contract.



The agreement of October 19th authorized the Union Arms Company to forward from Windsor to the Hartford factory, any portions of the stock embraced in the contract of September 21st; and it appears that, prior to the 3d of April, 1858, part of the property purchased by the defendants previous to that date, was forwarded from Windsor to the Hartford factory, and part of it remained at the Windsor factory. The Union Arms Company had at both factories, prior to, and on, the 3d of April, 1858, some parts of guns, and other materials, purchased by them of the Robbins & Lawrence Company; so that, on the 3d day of April, 1858, the property at Windsor and at Hartford consisted of property purchased by the defendants, and of parts of guns and other materials purchased by the Union Arms Company, and intermingled with the defendants' property at Hartford, as well as at Windsor; and the parts of guns and other materials of the Union Arms Company so intermingled, became subject to the provisions of the contracts of September 21st and October 19th, 1857. From this determination of the rights of the State Bank and Sandersen Brothers & Co. in the property, both at Windsor and Hartford, and including that so intermingled, it naturally follows that they could enter the factory at both places, and take their property; and they could, with the consent of the Union Arms Company, assemble guns at the Hartford factory; but, whether the defendants, with or without the consent of that company, entered the factory at Hartford, and made use of the machinery, or assembled guns at that factory, is wholly immaterial so far as relates to the title or right of the defendants to the property in question.

It appears that when the defendants resumed the exclusive possession of the property, they found guns in all stages of manufacture; and they soon commenced finishing off the work which remained unfinished at the time the Union Arms Company suspended business. On the 17th of April, 1858, the business ceased to be done, even in form, by, or in the name of, the Union Arms Company, and these defendants continued the manufacture of guns from that date to the last of June, 1858, without any agency or interference by the Union Arms Company. During

this time the defendants purchased a large amount of new materials, which went into the manufacture, and were deemed necessary in order to close the business in such manner as their relation to, and interest in, the property, and the rights of the Union Arms Company, required. No part of the property furnished by the defendants for the prosecution of the work was, on the principle of confusion and accession, forfeited on the part of the defendants. The intermingling of property which took place prior to the time they resumed possession, was by agreement; and the intermingling of the material furnished by the defendants after they resumed possession, was necessary in order to complete the work previously commenced. The new materials so furnished by the defendants after they resumed possession, became subject to the provisions of the contract applicable to the property previously purchased by them. The general title to all the property purchased by the defendants remained in them; and they became mortgagees of the property of the Union Arms Company, intermingled in pursuance of those contracts. Prior to the orator's attachment, his relation was precisely the same as that of any other creditor of the Union Arms Company, who had no lien upon the property. The orator, by his attachment on the 21st of June, 1858, acquired the right to assert in equity, in respect to so much of the property as was on hand at that date, any claim which the Union Arms Company could assert to it. This right would entitle him, by making payment or tender of the unpaid purchase money, and of the expenditures of the State Bank and Sanderson Brothers & Co., to stand in all the rights of that company, as between them and these defendants.

The State Bank and Sanderson Brothers & Co., prior to the orator's attachment, by their contracts and relation with the Union Arms Company, and by reason of the breach of those contracts on the part of that company, had acquired the right to take and dispose of the property in payment of their claims. This right existed at the time of the aforesaid attachment, and the State Bank and Sanderson Brothers, in the exercise of the right, had resumed, and then held, the exclusive possession of the property. Their title to the property, and their interest therein,

authorized them to dispose of it ; and prior to, and at, the time of the attachment, they were disposing of the property for the purpose of reimbursing themselves for their expenditures, and in payment of the notes. The evidence leaves no doubt that the acts of the defendants in their management and disposition of the property, from the time they took possession of it to the time of the orator's attachment (June 21st, 1858), were consented to by the Union Arms Company. The consent of that company was not essential to the exercise by the defendants of their right to take or dispose of the property, but the consent of that company to the acts of the defendants is important in determining the interest the Union Arms Company had in the property, and the right that company could assert to it as against these defendants, at the time of the attachment. The defendants having managed the property, and made sales thereof, in virtue of their title thereto, and by the consent of the Union Arms Company, from the 3d of April to the 21st of June, 1858, and there being no evidence that their management or disposition of the property up to that date, was fraudulent as against the rights of the orator as a creditor, prior to that time, we proceed to consider whether the defendants, in the management and disposition of the property, and in the collection of the proceeds thereof, subsequent to the orator's attachment, acted upon those just and equitable principles which are applicable to the case, and with due reference to the rights of the respective parties interested in the property. These questions arise on exceptions to the master's report. The orator insists that the defendants disposed of certain portions of the property without giving due notice of the time and place, or times and places, when and where the sales would be made ; but we think they gave all the notice the circumstances of the case required. It appears that the defendants sought for purchasers, corresponded with many rifle manufacturers, and others, who would need such machinery or materials, caused a printed circular to be distributed, offering the property for sale ; and the master found that they took all reasonable measures and exercised due diligence to effect a sale. The position of the orator, from the time of his attachment, was such that he must have had such

notice of the proposed sales as was sufficient to put him on inquiry, if he desired further information upon the subject. The orator, or his attorney, understood, at the time of the attachment, that the defendants claimed title to the property, and the right to dispose of it, and that they were then engaged in disposing of it in payment of their debts against the Union Arms Company. It appears that a portion of the property was sold by the defendants, by the consent of the orator, pending the injunction, and the injunction was dissolved in December, 1858, obviously for the purpose of enabling the defendants to dispose of the remainder.

There is no evidence in the case that the orator desired, or sought, for further information of the defendants in respect to the proposed sales, and the natural inference is, that he was willing they should dispose of the property upon such notice as he understood, or upon reasonable inquiry might have understood, had been given.

The 3d, 4th, and 9th exceptions proceed on the assumption that the defendants were bound to account for the property at its value on the 3d of April, or 21st of June, 1858, without regard to the avails realized by them. For the reasons already assigned, we think these exceptions are not well founded. The defendants were not tortfeasors in taking, nor in disposing of the property. The property was thrown upon the defendants in the necessary enforcement of their just claims. The relation of the defendants to the property required them, in the management and disposition of it, and in the collection of the proceeds thereof, to act in good faith, and with reasonable care and skill, and to account only for what they in fact realized, or to account for what they could have realized with due diligence.

This determination of the principle on which the defendants are liable to account, must be regarded, we think, as disposing of the orator's exceptions, so far as they relate to sales made, and the proceeds thereof collected, in pursuance of the rule above laid down. But the orator insists under the 6th exception, that the evidence shows negligence on the part of the defendants, in not collecting or attempting to collect the claim for rifles sold to the Mexican government, and it is claimed by the orator that the de-

defendants should be charged with the amount of that debt. This exception concedes that the defendants acted in good faith and with discretion in making the sale upon the security obtained ; and it concedes that the drafts were duly protested for non-payment ; hence, the only question raised by the exception is, whether the defendants, upon the testimony, should be charged with the claim on the ground of negligence in the use of means for its collection of the guarantor. It appears that William and Henry McGraw executed their guaranty for the payment of the drafts in question. It is not claimed by the orator that there was any culpable neglect in regard to proceedings against Wm. McGraw. The testimony tends to show that the defendants, soon after the drafts were protested, made some inquiry in respect to the property of Henry McGraw, and received such information in relation thereto, as satisfied them of his insolvency at the time of the protest ; consequently, no legal proceedings were instituted against him.

The defendants' testimony tended to show that Henry McGraw had no property, and there is no evidence in the case tending to show that he had property at any time after the drafts matured ; consequently, there is no evidence of negligence, unless negligence is to be inferred ; and we think it quite clear that there is nothing in the account given by the defendants of their efforts in respect to the collection of the debt, nor in the cause of their failure to collect it, which would, against the finding of the master, authorize a presumption of negligence on their part.

The master found that the defendants should not be charged with negligence in respect to this claim, and we think his finding is warranted by the evidence. In respect to the sale to Lamson, Goodnow & Co., we think the defendants should only account for what they received for the property. It appears that the defendants took reasonable measures to find a purchaser or purchasers, and that they exercised due diligence to effect a sale of the property, and sold it to the best advantage they could under the circumstances. The property was unsalable, and quite likely it was sold for less than its real value to a person who needed such kind of property ; but it does not appear that there was any negligence

or want of common prudence on the part of the defendants, in making the sale.

The account was properly taken with reference to the vested rights of these defendants and the Union Arms Company, at the time the orator acquired a lien upon the property. The decree, in pursuance of which the account was taken, authorized the master to allow the defendants ; 1st, all payments made by them at the request, or by consent of, the Union Arms Company, prior to the orator's lien, which were understood and treated by the defendants, and the Union Arms Company, as made under and in pursuance of the contracts of September 21st and October 19th, 1857 ; 2d, all payments made by the defendants within the scope of these contracts ; and 3d, all payments made by the defendants which were rendered necessary in consequence of the non-performance by the Union Arms Company, of the aforesaid contracts. The orator, at the time the payments mentioned in the first class were made, did not stand in a position to interfere with any legitimate transaction between the defendants and the Union Arms Company ; nor can he go back and object to any *bona fide* contract or payment made prior to his attachment. It is clear that the disbursements, rendered necessary in consequence of the failure of the Union Arms Company to perform their contracts with the defendants, were made upon the credit of the property. When the defendants took possession of the property on the 3d of April, 1858, a large portion of it was worth but little in the condition in which they found it. It was necessary that the work should be finished, in order to make it the most available to all parties interested ; and the defendants did, substantially, what chancery would have ordered done by a receiver, under our statute. The defendants are charged, and properly charged, with the avails received for all guns manufactured after the 3d of April, 1858, notwithstanding they were manufactured with the defendants' property, or with money furnished by them, and equity requires that their receipts should be applied to extinguish their disbursements, before extinguishing the notes. The master has found that these disbursements were necessary, and we think their allowance is correct. The testimony before the master tended to

show that the defendants, in the management and disposition of the property, in their efforts to collect the proceeds of the sales, in making disbursements, and in all their dealings with the Union Arms Company, connected with or growing out of the contracts, or resulting from the breach thereof, acted in good faith, with discretion and due diligence, and with due regard to the rights of the orator.

In relation to the remaining questions raised by the exceptions, we deem it sufficient to say generally that, in every view we have been able to take of the case, it seems to us that the account was taken upon correct principles, and that the findings of the master are supported by the evidence. Although the report of a master is not conclusive, it will not, ordinarily, be set aside, unless it appears affirmatively that the master was not warranted, upon the evidence, in his finding, or has erred as to the law applicable to the case.

The orator's equity, acquired by his attachment, is subordinate to the equity of the State Bank and Sanderson Brothers & Co. His attachment was made, and this bill is brought, for the purpose of securing to the orator such interest as the Union Arms Company had in the property on the 21st of June, 1858. The account, as taken by the master, and approved by the chancellor and by this court, shows that the avails of the property in question, are insufficient to satisfy the prior legal and equitable claims of the State Bank and Sanderson Brothers & Co., for the payment of which the property was encumbered, and that there is still due to them a large sum on the notes; consequently, the orator can take nothing by his attachment.

The result is, that the decree of the chancellor dismissing the orator's bill, is affirmed, with costs to these defendants. The cause is remanded to the court of chancery, and is to be disposed of accordingly.

BARRETT, J., delivered the following additional opinion:

The magnitude of the case, and the ability of the elaborate arguments addressed to the court at the last general term, when for the first time I participated in the proceedings, lead me to pre-

sent a comprehensive summary of the views upon the leading points upon which I have come to the result announced by Judge WILSON as the judgment of the court. I pass all the details so fully presented and discussed in the elaborate opinion read by him.

The bill was framed and based on the ground that, under the contracts set forth in it between the Union Arms Company and the defendants, the defendants became and were mortgagees of the property specified, which they held as security for the payment of their notes and lawful charges; and that the orator, as creditor of the Union Arms Company, by virtue of his attachment, was entitled to assert the right of that company as mortgagors, and thereby to have an account of all receipts of money and avails of other securities, properly applicable as payment of said notes and other charges; and claimed that such receipts and avails were more than sufficient to pay all that was due to the defendants, and prayed an account accordingly, and an injunction and receiver, and that the surplus of avails from all sources, held or received by the defendants, after satisfying their claims, be held subject to the order of the court to apply on such judgment as the orator should obtain in his suit at law, in which he had made attachment of said property.

The supreme court, when the case was formerly before it, at a session in which I did not participate, ignored the character assumed for the defendants by the orator in his bill, under the contracts and transactions with the Union Arms Company, and held that said company stood in the relation of *conditional vendee* of the property which was the subject of said contracts and transactions; and found from the evidence, as was said, that the defendants had received something to apply on the notes for the payment of which they held a *lien* on the property; and held that it might prove to be the right of the orator under the statute of 1854 to pay the balance of the debt, and hold the property under his attachment—but that, as the matter was situated, the amount to be paid could be ascertained only as the result of an accounting, which a court of chancery alone was competent to order and compel—and on this ground, the court entertained the bill, and ordered an account to be taken.



The bill does not charge any fraud or wrong doing on the part of the defendants, as giving the orator a right, or subjecting the defendants to a liability, or giving ground for a resort to a court of equity. It is based exclusively on the relation of the parties created and fixed by the recited contracts, and on the averred facts that the defendants had received avails of the use of the property in question and of other collateral securities, which, when applied, would wholly pay the debt, and thus relieve the property so as to render it available to the orator under and by virtue of his attachment. The bill stands, not on any ground of duty owing by the defendants directly to the orator, but upon the legal right of the orator to hold by attachment the property of the Union Arms Company; and it is resorted to as the only means of effectuating that legal right, as to the property encumbered by the debt of the defendants, and to this end, asserts the legal and equitable duty of the defendants to the Union Arms Company to account for, and apply the avails of the securities held by them, in satisfaction of their debt and charges, and to that extent thus yielding the property to the operation of the orator's attachment and final process.

In the relation assigned by the supreme court in this case to the parties under and by force of the recited contracts, the interposition of the court of chancery is accorded only on the ground of the legal right of the orator to reach the property under his attachment in virtue and by force of the specific provisions of the statute of 1854 in behalf of creditors of conditional vendees of personal property, and for the sole purpose of rendering effectual the ordinary *mesne* and final process of the court of law. The judgment and mandate of this court, in pursuance of which the account has been taken, were not based on rights in the orator and correlative duties on the part of the defendants resting in, or arising from, the principles of moral or legal equity operating directly between the orator and the defendants, but upon the legal right of the orator as against the Union Arms Company, and the legal and equitable duty of the defendants to that company. They do not involve or assume any equities as giving the right on the one hand, or imposing the duty on the other, between the orator

and the defendants. The accounting, therefore, was to be such as by the rules of the common and statutory law, and the principles of equity, the defendants were bound to make as between themselves and the Union Arms Company.

The defendants held the title to the property, and were entitled to assert it in a proper manner for the purpose of realizing satisfaction of their debt. The Union Arms Company had failed to pay it, and on the 3d of April, 1858, abandoned the attempt by the use of the property, pursuant to the provisions of the existing contracts, of trying to pay it. What was done thereafter in respect to the property and the means in their hands, the master finds to have been done in good faith, in the exercise of proper care, diligence, and discretion, for the purpose of turning such property and means to the best account for the satisfaction of the debt and charges with which said property was burdened. It is specially worthy of notice that at the time this bill was brought, all the acts and transactions between the defendants and the Union Arms Company, and all the acts and transactions of the defendants in taking possession of and holding the property in their own right, and in exclusion of said company, except the subsequent sales of the property, had transpired, and were then in operation and effect; and yet, there is no avérment in the bill, nor finding by the master, nor evidence reported, that the defendants intended or did any thing wrong, unlawful, or inequitable, as against the Union Arms Company. It would therefore seem difficult to assign a well grounded reason for charge or claim by the orator that the defendants should be affected or held accountable as *wrong-doers* in taking possession of the property in April, 1858.

The master having found, on what would seem to be warrantable and sufficient ground, furnished by the pleadings, orders and proofs, that, in the transactions under the contracts, and in the successive conjunctures that arose in the prosecution of the business under them by the Union Arms Company, which constitute the subject-matter of inquiry, and material elements, in the account to be taken by him, that the defendants acted in good faith, and with proper care, diligence and discretion, it seems quite

clear that the defendants should be held chargeable for only what they in fact realized from the property and means in their hands, and that they should not be subjected to any higher charge, or larger deductions, on the ground assumed in the argument before the master and in this court, viz: that they were *wrong-doers* in taking possession of the property as they did.

Unless the defendants should be thus subjected, and the account taken on the basis that they were *wrong-doers*, the particular items with which it is claimed they should be charged on the one hand, and disallowed to them on the other, would not change the final determination to be made of the case (as for instance, the item of guns sold to the Mexican government, and other things discussed in arguing the exceptions.) I notice again, what has been before intimated, that the grounds upon which the questions now before us have been raised, are not presented by averments in the pleadings, but by the report of the master, and the evidence that was before him in taking the account.

It is firmly settled in this state, that the master's report will be regarded as settling the facts which fall within his province to find, and which he reports as found, unless it appears affirmatively that he has found facts without evidence, or against evidence.

All the questions as to good faith, proper cause and occasion, proper care, diligence and discretion, were raised first before him upon the evidence adduced before him in the accounting he was to take.

This court have revised his findings in these respects, in view of the evidence reported. The result of such revision is, that we see no occasion to impeach or discard his findings upon any of the points vital to the final decision.

The master's report shows that at the time the orator made his attachment, not only had the defendants not received any thing to apply on their notes, but their disbursements exceeded their receipts by \$53,820.84, or (disallowing certain items), by \$42,312.72. Instead of this debt being diminished, it had nearly doubled at that time. Of course, then, the case did not fall within the provisions of the statute of 1854, giving an attaching creditor a right to pay the balance where part of the purchase

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Tilden v. Minor et als.

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money shall have been paid, and to hold the property by his attachment.

This state of the case was brought out by the accounting, and what was held by the supreme court in this interlocutory decision and mandate, was based upon the state of the evidence as it was then before the court, prior to the accounting, and is not understood to have been designed or regarded as concluding the fact, except as a ground for ordering the account to be taken. This being so, there is only left to the orator to urge his equitable right to claim any surplus of avails of all the property and securities received by the defendants, after a just and equitable accounting and adjustment between the defendants and the Union Arms Company.

The property having been properly disposed of, and the avails failing to pay the amount of the debt and the just charges of the defendants resting upon it, of course, the defendants cannot be held to the Union Arms Company, or to the orator, for anything to apply on the orator's judgment against said company.

The object of the bill, in any aspect of it, has, therefore, failed, and it should be dismissed with costs, to be taxed and adjusted in the court of chancery, having regard to the former order of this court in respect to costs.

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DANIEL TILDEN v. MINOR, SMITH & MORIARTY; E. G. CULVER,  
TRUSTEE, AND THE MERCHANTS' NATIONAL BANK OF  
CHICAGO, CLAIMANT.\*

*Assignment of Bill of Lading.*

The assignment of a bill of lading as collateral security, conveys title to the cargo.

TRUSTEE PROCESS. The facts reported by the commissioner sufficiently appear in the opinion of the court; except that, the trustee got possession of the corn in question without fault of the

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\* This case was decided at the general term, in November, 1871.

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claimant, before the commencement of this suit, without paying therefor. The court, Windsor county, BARRETT, J., presiding, rendered judgment against the defendant by default, and judgment, *pro forma*, against the trustee for \$236.60; to which the claimant excepted.

C. P. Marsh, for the claimant, cited *Bank of Rochester v. Jones*, 4 Comst. 497; *Hibbert et als. v. Carter*, 1 T. R. 745; *Conard v. Atlantic Ins. Co.* 1 Peters, 387, 445; *Barrow v. Cole*, 3 Camp. 92; *Nathan et al. v. Giles et al.* 5 Taunt. 558; *Allen et al. v. Williams et al.* 12 Pick. 297; *Davis & Aubin v. Bradley & Co.* 24 Vt. 55; S. C. 28 Vt. 118; *Bryans et al. v. Nix*, 4 M. & W. 775; *Anderson v. Clark*, 2 Bing. 20; *Gardner v. Howland & Tr.* 2 Pick. 599.

S. E. & S. M. Pingree, for the plaintiff.

The claimant was in no sense such a *bona fide* assignee of the draft in question as would entitle it to hold the funds in the trustee's hands as against the plaintiff, even with seasonable notice of the assignment. Gen. Stat. ch. 34, §§ 44, 47.

Had the transfer been *bona fide*, still, we insist that actual personal notice thereof by the claimant to the trustee, before suit brought, was necessary. *Guilford et als. v. Smith et als.* 30 Vt. 49, 66.

The opinion of the court was delivered by

REDFIELD, J. The defendants were grain dealers in Chicago. The trustee had purchased of the defendants several carloads of corn and feed, which had been paid for by honoring drafts by defendants, on the trustee, sent to the Woodstock National Bank for collection, with the bill of lading thereto attached, endorsed in blank. In June, 1869, the trustee ordered another carload of corn; and on the 15th day of the same month, it was forwarded in car No. 604 by the defendants to *their own order*, with the memoranda on the bill of lading, "Notify E. G. Culver, West Hartford, Vt."

On the same day, defendants drew a draft on the trustee for \$236.30 (the price of the corn), payable to the order of H. C.

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Willson, cashier of the Merchants' National Bank, Chicago. Said bank became purchasers, as is claimed, of the draft, and credited the amount (less some small fees for collection) on the bank books, as a deposit by defendants. The defendants delivered the bill of lading, endorsed in blank, to the bank, as collateral security for the payment of the draft. On the same day, the Merchant's National Bank sent said draft, by mail, to the Woodstock National Bank, "for collection and remittance;" and with directions to "hold bill of lading subject to the payment of the draft." The draft was received by the Woodstock National Bank in due course. The latter bank gave immediate notice by letter to the trustee, which was received by the family of the trustee while he was absent in Canada, and before service of this process. *see other facts p. 176*

I. The facts reported by the commissioner show that the Merchants' National Bank, Chicago, were the purchasers and owners of this draft.

II. The endorsement and transfer of the bill of lading as collateral security for the payment of the draft, vested in the bank the title to the cargo. *Hibbert et al. v. Carter*, 1 T. R. 745; *Nathan et al. v. Giles*, 5 Taunt. 558; *Davis et al. v. Bradley & Co.* 24 Vt. 55. *Same v. Same*, 28 Ib. 118.

In the latter case, REDFIELD, Ch. J., has very fully collated the adjudged cases, and stated the rule that governs this class of cases.

The movement of the immense products of the West to the seaboard, involves the use of large sums of money, which requires confidence and credit. To ensure that, the bill of lading has been held and regarded in law as the symbol and representative of the cargo. The assignment, for honest purposes, of the bill of lading, is effectually the assignment of the cargo; and since railways have made continents navigable as well, as the sea, and immense products, and almost limitless tonnage, are floated by their agency to the great central depots of commerce, the propriety and necessity of the rule becomes more apparent; and the duty of the court to make it certain and inflexible, more obvious.

The act of taking possession of the corn by the trustee, was wrongful and tortious, and created no debt *ex contractu* to any

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one. The corn was consigned to the *order* of the *defendants*, and the trustee had no more right to take possession of the corn than any other stranger.

If the bill of lading had not been transferred, the defendants might have treated the trustee, at their election, as a tortfeasor, and, in that case, the trustee would have owed the defendants no debt attachable by trustee process. 1 Smith Lead. Cas. 1074-5, and 1079, note.

III. The title of the corn never having vested in the trustee, it is immaterial whether he had notice of the sale of the corn to the Merchants' National Bank; and we have no occasion to determine whether the facts reported establish such notice. The *pro forma* judgment of the county court is, therefore, reversed, and judgment that the trustee be discharged, and that the fund belongs to the claimants, with costs.



### WINSLOW S. MOORE v. TOWN OF WARREN.\*

#### *Soldier's Bounty.*

The books and records in the office of the adjutant general of the state, and not the date of muster-in, control as to who are entitled to bounty under a vote of a town to pay a bounty to those who should apply on a quota under a given call. Vide *Bucklin v. Sudbury*, 43 Vt. 700.

ASSUMPSIT to recover a town bounty. Plea, the general issue, and trial by jury, March term, 1871, Washington county, PECK, J., presiding.

The president of the United States, on the 17th October, 1863, issued a call for 300,000 volunteers, under which call the quota of the defendant was fourteen men. On the 21st of November, 1863, the town, by a legal vote, "directed the selectmen to pay to each and every volunteer who shall enlist to fill the quota of the town on the present call of the president of the United States

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\* This case was heard at the August term, 1871, Washington county supreme court, and the opinion delivered at the general term, in November, 1871.

for 300,000 men, \$200; to be paid after being sworn into the service of the United States." On the 10th of December, 1863, the town legally voted "to raise \$115 for each and every recruit, in addition to the \$200 raised at a former town meeting, that have, or shall, enlist before January 1, 1864, to fill the quota of the town of fourteen men, ordered by the government on the last requisition of the president of the United States for 300,000 men, to fill the old regiments in the field."

On the 15th of December, 1863, the plaintiff, who was then a soldier in the 6th regiment of Vermont volunteers, re-enlisted at Brandy Station, Va., and was mustered in on the 16th, and credited to the defendant, because he was a native of the town, and had understood the town was paying a bounty. On the 5th of January, 1864, he came home to Warren, on a furlough, and on that day saw one of the selectmen of the town, and told him he had re-enlisted to the credit of the town, and that he understood the town was paying a bounty, and that he expected a bounty. About a week afterwards, he told the selectman that another town had offered him a bounty, and that he wanted something done about it. It appeared by the books of the adjutant general of the state, that the town was credited with fourteen men, all of whom enlisted on or before the 14th of December, 1863, and were mustered between the 4th and 25th of said December, and that they were the men who filled the quota of the town under said call. It was proved that some time after the middle of January, 1864, muster rolls were received at the adjutant general's office, showing that certain men, and among them the plaintiff, had re-enlisted in the field, and been set to the town of Warren, and that the plaintiff was the fourth man thus mustered; and these men, including the plaintiff, were then passed to the credit of the defendant on the adjutant general's books, and were applied on the defendant's quota under a call of the president issued February 1, 1864.

The fourteen men who filled the quota as aforesaid, were contracted with by the selectmen of the town, mustered in, and paid the bounty, according to the said votes, before January 1, 1864, and before the selectmen knew that the plaintiff had re-enlisted,



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Moore v. Warren.

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or been mustered to the credit of the town, which they did not learn before January 5, 1864.

The court, *pro forma*, directed a verdict for the plaintiff for the amount named in each vote, separately, with interest from January 5, 1864 ; to which the defendant excepted.

*C. J. Gleason*, for the defendant.

*Randall & Durant*, for the plaintiff.

The opinion of the court was delivered by

BARRETT, J. On the argument of this case, the court concurred in opinion ; but as only three of the judges could sit in the hearing, it was thought advisable to hold it till the case of *Bucklin v. Sudbury* should be re-argued at the general term in November, 1871. As it stands in its controlling features on the same grounds as that case, the opinion in that case may be referred to for the views and reasons upon which this case is decided. It is proper to remark that it is distinguished from the case of *Chase v. Middlesex*, referred to in the plaintiff's brief, in the fact that the plaintiff in that case was shown to have been reckoned at the adjutant general's office upon the quota of the town under the call of October 17, 1861. It is distinguished from *Kittredge v. Walden*, also cited in the plaintiff's brief, in the fact that, in that case, the vote did not make it a condition that the volunteer should be applied on a specified quota ; and, further, it was found affirmatively that "the plaintiff was mustered in under that call to the credit of the town of Walden."

Judgment reversed, and cause remanded.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF CHITTENDEN,  
AT THE  
JANUARY TERM, 1878.

PRESENT :

HON. HOYT H. WHEELER, HON. HOMER E. ROYCE, HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS,	}	ASSISTANT JUDGES.
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NOAH ALLEN v. THE CITY OF BURLINGTON.

*Burlington City Charter. Warning for City Meeting. Taxes.  
Voluntary Payment.*

The charter of the city of Burlington, which provides that all warnings for city meetings "shall be issued by the mayor, and published in the manner designated in the by-laws of the city," delegates to the city the right to fix, by a standing by-law, the time and extent of such publication, and is not controlled by § 12, ch. 15, of the Gen. Stat., which provides how town meetings shall be warned.

Under the following article in the warning of a city meeting, viz: "To vote upon the question of raising money by tax or otherwise, to meet the accruing expenses of the city government, and for school purposes, for the ensuing year," it was *held* that the meeting could not legally vote a tax, or authorize the mayor to borrow money on the credit of the city, for the purpose of erecting a high-school building.

The only business article in the warning of a city meeting, held March 19, 1866, was in these words: "To vote whether the city will authorize the city council to pledge the credit of the city to an amount not exceeding \$150,000, payable in not less than 20 years, with interest at six per cent. per annum, to provide a supply of water for the use of the

## Allen v. Burlington.

city." The meeting voted, in the language of the warning, to authorize the city council to pledge the credit of the city for the purpose therein named; and also voted to authorize the city council to annually assess upon the grand list of the city, in addition to certain other rates and taxes, a tax of ten per cent. to be invested as a sinking fund, and to be applied in extinguishment of said water debt. *Held*, that said last named vote was void, and a tax assessed thereunder on the grand list of 1869, illegal.

*Held*, that said tax was also illegal, because not assessed upon the grand list of 1866.

If one pays a tax assessed against him, under protest, to save his property from distress, and himself from a penalty and costs, it is not such a voluntary payment as to preclude him from recovering back the tax so paid, if illegal, although no warrant may have issued for its collection.

GENERAL ASSUMPSIT. Plea, the general issue, and trial by the court, September term, 1872, PIERPOINT, Ch. J., presiding.

The plaintiff introduced in evidence the record of the proceedings of the board of aldermen of the city of Burlington, at a meeting thereof held on the 31st of May, 1869, at which were assessed the several taxes named in the city treasurer's receipt set out in the opinion. The "sinking fund tax," named in said receipt, was assessed under and by virtue of a resolution hereinafter stated, which was passed at a city meeting held on the 19th of March, 1866, for the purpose of providing a sinking fund for the extinguishment of the city water debt. The plaintiff also introduced in evidence the record of the warning and proceedings of a meeting of the legal voters of said city, held on the 31st day of May aforesaid. The tenor of said warning, and the proceedings of said meeting, are stated in the opinion. The plaintiff also introduced the record of the warning and proceedings of a meeting of said city, held on the 19th of March, 1866; at which the following resolutions were passed, viz.:

"Resolved, that the city council are hereby authorized to pledge the credit of the city to an amount not exceeding 150,000 dollars, payable in not less than 20 years, with semi-annual interest at six per cent. per annum, to provide a supply of water for the use of the city."

"Resolved, \* \* \* \*; and the city council are hereby authorized to assess upon the grand list of the city, annually, in addition to that required by law, and ordinary city taxes, such a sum as will pay the excess of interest over the income from water rates, and ten per cent. additional; the sum which shall be raised by the 10 per cent. tax to be invested in city, Vermont state, or United States, bonds, as a sinking fund, to be applied in extinguishment

of the debt created under the resolution this day adopted for the procurement of water, at maturity."

The tenor of the warning under which said meeting was held, is given in the opinion.

The plaintiff also introduced a city ordinance, entitled, "An ordinance in relation to warnings for elections," the validity of which was conceded, if the same was authorized by the city charter, and the tenor of which is also given in the opinion. Also, the treasurer's receipt set out in the opinion, signed by H. H. Doolittle, as city treasurer, with the memorandum on the back thereof; and it was conceded that said Doolittle was city treasurer at the date thereof.

The plaintiff testified as follows:

"On the 14th August, 1869, I procured greenbacks and went to the treasurer's office to pay my tax. I told Doolittle I wished to pay my tax under protest. He said, 'Very well,' and passed the receipt to me to have me write the protest on the back. I paid the amount of the tax, and he receipted it. I don't recollect as the legality of the tax was discussed at that time. I think it was not."

On cross-examination he testified:

"I have stated as near as I can recollect, all that was said between me and Doolittle on that occasion. I don't think anything further was said between us."

On re-examination he testified:

"I took a man with me when I went to pay the tax."

No other testimony was introduced. The court found the facts as testified by the plaintiff, and rendered judgment, *pro forma*, for the defendant. Exceptions by the plaintiff.

*C. J. Alger* and *R. C. Benton*, for the plaintiff.

I. The money having been paid under protest, to satisfy a tax-bill which the city treasurer had against the plaintiff, may be recovered back in an action of assumpsit, if the tax was illegally assessed. And the payment, too, even if not made under protest, may be recovered back, if it was made to prevent the issuing of a warrant against the person or property of the tax-payer; and

if paid to the proper officer whose duty it is by law to issue the warrant, the court will presume, nothing appearing to the contrary, that it was paid to prevent-distrain of property, and not voluntarily. *Henry v. Chester*, 15 Vt. 460; *Babcock v. Granville*, 44 Vt. 325; *Preston v. Boston*, 12 Pick. 7; *Amesbury W. & C. Manuf. Co. v. Boston*, 17 Mass. 461.

The collection of taxes in the city of Burlington is regulated by special statute, and the process is entirely different from that prescribed by the general law of the state.

The city treasurer is there made the collector. The tax-payer is required by law to pay the tax within one month and eight days after publication of notice by the treasurer that the tax-bill is in his hands for collection. If the tax is not paid within that time, the treasurer is required by law to issue his warrant against each delinquent tax-payer, not only for the tax, but for a penalty of five per centum on the amount of the tax, together with a fee of twenty-five cents for the warrant, and the officer's fees for collecting the same. Session Laws, 1868, 105. By this law, the plaintiff was obliged to pay the tax in order to save the enforcement of the penalty, the distrain of property, and the costs of process.

The tax was paid under protest; the fact is so found. The treasurer, too, received it as paid under protest; he having receipted the bill, with the memorandum on it that it was so paid. Everything had been done, apparently, which either the plaintiff or the defendant's treasurer deemed requisite or necessary, to make it a payment under protest. It was not, then, in any sense, a voluntary payment; nor so construed by the defendant at that time. See cases cited *supra*.

All that is required on principle, and from these authorities, is, that the payment shall not be so made by the plaintiff as to indicate that he waives his right to object to, and acquiesces in, the illegality of the tax.

II. The main question in the case is, were these taxes lawfully assessed?

1. As to the meeting held May 31, 1869, it is to be noted that the meeting was not properly warned, twelve days notice not having been given as required by Gen. Stat. c. 15, § 3. The city char-

ter provides that the city "shall have, exercise, and enjoy, all such rights, immunities, powers, and privileges, as are conferred upon, or incident to, towns in this state, and shall be subject to like duties, liabilities, and obligations, except as is otherwise provided in this act." Amended Charter, Acts of 1865, No. 139, § 1. The charter provides for the *manner* of publishing the warnings; gives the city council authority to make a substitute for posting "in three public places;" but does not provide any way by which a dishonest or corrupt city council could enact an ordinance which would give themselves the authority, on three days or three hours notice, to call a city meeting, and lawfully vote taxes upon the people.

Cities and towns are called upon, often, to transact important business in these meetings, and it is proper that sufficient time should be given for considering the matters presented in these warning notices; and there is no reason why cities should have less time for consideration than towns have. The law fixes the time at twelve days—that was not given—hence the meeting was illegal, and there is no authority for assessing the taxes there voted. Gen. Stat. 106, § 3; City Charter, Acts 1864, No. 98, § 17; *Pratt et als. v. Swanton*, 15 Vt. 147; *Thames Manf. Co. v. Lathrop et al.* 7 Conn. 550; *Hayden v. Noyes*, 5 Conn. 391; *Woodward v. Killingworth Bros.* 8 Conn. 247.

2. But if the meeting had been properly warned, certain items of the tax would have been illegal and void, because they do not come properly under the warning notice. "The business to be done, and the subjects to be considered at such meeting," are to be substantially set forth in the warning. No tax-payer, reading that warning, could have had any notice, or intimation, that the city was to be called upon at that time to decide upon erecting a high-school building, costing, as the one did that was authorized that day, over thirty thousand dollars; nor that a tax of 20 per cent. on the grand list, or any other sum, was to be voted for that purpose.

3. There is nothing in the warning or votes of that city meeting, authorizing the sinking-fund tax of ten per cent. *Alger v. Curry*, 40 Vt. 437.

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III. The vote in the city meeting held in March, 1866, cannot be made to legalize the sinking fund tax of ten per cent., assessed in 1869 by the city council.

1. Because there was nothing in the warning for that meeting, which indicated that any tax was proposed to be voted upon the list of 1869, or any year between 1866 and 1886.

2. Because there is no law authorizing any meeting to vote a tax upon any grand list, except the list of those voting it. Gen. Stat. ch. 84, § 66; *Alger v. Curry*, 38 Vt. 382; *Capron v. Rais-trick*, 44 Vt. 515; *Blush v. Colchester*, 39 Vt. 193.

IV. The authority vested by the charter in the city council in relation to the assessment of taxes, cannot be brought in to legalize these assessments in spite of the defects in the warnings and votes above considered. They are authorized to assess a tax of fifty cents on the dollar for city purposes, and fifty cents on the dollar for school purposes, in any year when the city meeting shall not have voted a larger sum. The authority to assess fifty cents cannot cover the 125 cent tax; and having used the authority in relation to schools, by assessing a 45 cent tax, they cannot use that again, or in part, to cover the 20 per cent. tax for high-school building.

V. The conclusion would then seem to be, that the first item of the tax (125 per cent. for city purposes) is illegal, because the warning for the meeting was not properly published; and the second item of the tax, for the same reason, and for the further reason, that it was not indicated in the warning as one of the subjects to be considered at that meeting; and the last item of the tax, because there is no vote or authority for it whatever.

VI. A tax illegal in part, is wholly illegal and void, and hence the whole sum paid, with interest thereon, should be recovered in this action. *Drew v. Davis et al.* 10 Vt. 506; *Stetson v. Kimpton*, 13 Mass. 272; *Bangs v. Snow*, 1 Mass. 181; *Libby v. Burnham*, 15 Mass. 144; *Dillingham v. Snow*, 5 Mass. 547; *Johanson v. Colburn*, 36 Vt. 693.

*Wales & Taft*, for the defendant.

All the proceedings in the assessment of the taxes which the plaintiff seeks to recover, were valid, and in accordance with the

statutes existing upon that subject. The meeting held on the 31st day of May, 1869, was legally warned in accordance with the charter, and duly published. The charter provides that all warnings, &c., "*shall be issued by the mayor, and published in the manner designated in the by-laws of the city.*" Acts of 1864, 116, § 17.

The warning was issued by the mayor, and published as required by the by-law. The meeting was, therefore, properly called, and the warning sets forth the purposes for which it was so called.

At this meeting the city council were authorized to assess the city tax of 125 cents, and the high-school building tax of 20 cents, on the dollar of the grand list. The city council had power to assess the tax of 45 cents on the dollar of the grand list, under § 39, page 106, acts of 1868, and the tax of 20 cents for highways, under the act of Nov. 22, 1864, page 80, § 1, and § 24 of the charter. Acts of 1864, page 120.

The sinking-fund tax was authorized by the legal voters of the city, at the meeting held on the 19th day of March, 1866. The city council had power, likewise, to assess the tax under section 24 of the original charter. Under this authority given them to assess 50 cents on the dollar, only a ten cent tax was assessed, as the other taxes, as hereinbefore shown, were authorized by the legal voters.

The question arises as to the character of the payment made by the plaintiff; was it voluntary, or made by compulsion?

The manner of assessing and collecting taxes in the city, is regulated by the act passed in 1868, amending the charter. See acts 1868, page 104. The treasurer is the officer who has the only authority to issue a warrant for the collection of a tax, and he cannot do this until the expiration of one month and eight days from the time said tax-bill shall have been delivered to him; and after the delivery of the warrant to the constable, the power of the treasurer to receive the tax from the tax-payer, ceases. Nothing is shown by the plaintiff as to the time of payment, whether before or after the expiration of one month and eight days from the time when the tax-bill was placed in the treasurer's hands. It does not appear in the case that it was after the expi-



ration of that time. If this fact is necessary, and it certainly is, it is incumbent upon the plaintiff, to entitle him to recover, to show it, and that a warrant had been issued; but from the fact that it was paid to the treasurer, the inference is plain that the payment was made before the treasurer could legally issue a warrant. The money paid, then, was paid by the plaintiff voluntarily, upon a tax-bill without a warrant, with no attempt on the part of the treasurer to enforce payment. Under such a state of facts, the plaintiff cannot recover. *Babcock v. Granville*, 44 Vt. 825. In that case, the jury found that the payment was not a voluntary payment. But farther than this, the evidence detailed in the exceptions has no tendency to show that the plaintiff was *reluctant* about its payment, or that the treasurer insisted upon collecting it; so that it was a purely voluntary act on the part of the plaintiff, and it is well settled, that under such circumstances, he cannot recover. *Sheldon v. School District*, 24 Conn. 88; *Barrett v. Cambridge*, 10 Allen, 48; *Smith v. Readfield*, 27 Me. 145; *Hathaway v. Addison*, 48 Me. 440. And see, also, as decisive upon this point, and of this case, *Lee v. Templeton*, 13 Gray, 476.

If the court hold that the plaintiff can recover, it can only be for those items of the specification that are found to be illegally assessed, and paid by compulsion. The assessments being separate, the case is unlike a single assessment for matters, some of which are legal and some illegal. *Osgood v. Blake et als.* 1 Foster, N. H. Rep.; *Brackett v. Whidden*, 3 N. H. 17.

The opinion of the court was delivered by

REDFIELD, J. This action is assumpsit to recover the sum of \$217.60 paid by the plaintiff to the city treasurer, for taxes assessed against him by the defendant city. The payment was made on the 14th of August, 1869; for which the plaintiff then took the treasurer's receipt, which sets forth the several taxes, and the purposes for which they were assessed, as follows:

"BURLINGTON, Aug. 14, 1869.

"Received of Mr. Noah Allen, in full, city tax on grand list  
of 1869, \$1.25, \$123.41

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" High School Building tax,	20,	19.75
" Highway tax,	20,	20.14
" School tax,	45,	44.48
" Sinking-fund tax,	10,	9.87 "

With this memorandum on the back of said receipt:

" Paid under protest, Aug. 14, 1869. N. ALLEN."

On the 31st May, 1869, the legal voters of the city assembled, and voted to raise \$1.25 on the dollar of the grand list for current expenses of the city government, and twenty cents on the dollar for the erection of a high-school building. And on the same day the board of aldermen made the assessment.

The warning for the meeting of voters of the city, was issued and published in accordance with the standing by-laws of the city, but not twelve days before the meeting; and specified the purpose and business of the meeting in these words, viz: "To vote upon the question of raising money by tax, or otherwise, to meet the accruing expenses of the city government, and for school purposes for the ensuing year." Under this warning the meeting voted, "That the wants of the city demand the immediate erection of a high-school building"; and not only voted a tax of twenty cents on the dollar of the grand list, but authorized the mayor to borrow on the credit of the city, a sum not exceeding fifteen thousand dollars, for the purpose of erecting said building.

I. It is claimed by the plaintiff that the assessment of the tax of \$123.41, for current city expenses, is illegal, for the want of twelve days notice by the warning for the meeting which voted it. The charter provides that all warnings, &c., "shall be issued by the mayor, and *published* in the manner designated in the by-laws of the city." The ordinance of the city council, in regard to this provision of the charter, is as follows: "All warnings for meetings referred to in the 17th section of the charter of this city, shall be published in each of the daily newspapers of this city three times successively, the last of which publications shall be not more than ten, nor less than six days prior to the meeting so called."

It is insisted by the plaintiff that the provision in the General Statutes, requiring warnings to be *posted* "at three public places,"

&c., "at least twelve days before the time appointed for such meetings," is not modified *as to time* by the charter; and that the charter substituted *publication* for *posting* of the notice, merely. The charter provides, not only for the *manner* of notice, but for one of a different *kind* and *character*. The publication of such notice in all the daily newspapers, in the manner provided in the by-laws, would apparently be more full and ample notice to the voters than the posting of a notice, as provided for towns in the General Statutes; and this springs from the character of the notice, and the means of publicity. Legal notices by publication, have, as a general rule, successive insertions; and if the twelve days is required, it would follow that the last insertion should be "at least twelve days" before the meeting; for the several acts are entire, and but one notice. Nor do we think the danger from delegating to the voters of the city the right to determine the sufficiency of the notice by which they shall be bound, so imminent and appalling as counsel apprehend. The voters of the city have every interest to require full notice, and by the charter, they may provide one satisfactory to themselves, and make it unalterable by any agency save their own. We think a fair construction of the charter, requires warnings to be *signed* by the mayor, and *published*; but delegates to the city the right to fix by a standing by-law, the time and extent of such publications.

It is claimed that the warning gave no notice of a purpose to vote a tax, or borrow money, with which to erect a high school building. The only business article in the warning is this: "To vote upon the question of raising money by tax, or otherwise, to meet the accruing expenses of the city government, and for school purposes, for the ensuing year." "School purposes" could have no other meaning in that connection, without the perversion of language, than the ordinary and current expenses in sustaining the existing schools of the city. The location and construction of a costly building for a high-school, for the use of the citizens of the city of Burlington, could not be otherwise than of special interest and importance to the voters of the city. Yet the warning gave no notice of such a purpose. The legislature of this state have regarded the *location* of a school-house in school-dis-

tricts of so much importance as to require a two-thirds vote to fix the location. Gen. Stat. 155, § 44. The assessment of this tax, and the pledge of the credit of the city to the amount of \$15,000, were done by one and the same resolution, and for authority, must stand alike. If that meeting could pledge the credit of the city for \$15,000, it could for \$40,000, the alleged expense of the entire structure. The statute requires that the warnings shall "set forth the *business to be done*, and the *subjects to be considered*." The purpose of the warning is *notice*, and should, at least, indicate to the voters the *character* of the "business to be done," and the "subjects to be considered." If notice to raise money "for school purposes for the ensuing year," would allow the city to vote money to build a high-school building, and pledge the credit of the city to borrow money for that purpose, it might vote money, or pledge its credit, to build or endow academies and colleges within its precincts, and if this be so, we see no reason why the other clause in the warning, viz., "To raise money to meet the accruing expenses of the city government," would not allow the city to vote money and pledge its credit to build gas-works and water-works, to any extent, and at any cost. We think, if a town or city would launch into new, projected enterprises, extraordinary in character, the "business to be done," or, at least, the "subject to be considered," should be named in the warning. The vote, therefore, assessing a tax of \$19.75 for the "high-school building," was not authorized by the warning, and was illegal and void.

II. The "sinking-fund tax" of ten per cent. on the grand, list is sought to be justified under the vote of March 19, 1866. That purported to authorize the city council, annually thereafter, to assess a tax on the grand list, of ten per cent., to provide a sinking-fund, for the purpose of extinguishing the debt accruing from the construction of the aqueduct to provide water for the city. The only business article in the warning for the meeting that passed that vote, was in these words: "To vote whether the city will authorize the city council to pledge the credit of the city to an amount not exceeding \$150,000, payable in not less than twenty years, with interest at six per cent. per annum, to provide a supply of

water for the use of the city." The meeting passed a resolution authorizing the city council to pledge the credit of the city, in the very language of the warning. When this resolution was ratified by vote, the specific "business to be done," had been done; the whole "business" named in the warning had been finished; and the authority, under the warning, exhausted. The provision for the sinking-fund was not only not authorized by the warning, but was directly in conflict with the special provision in it. The warning definitely provides that the proposed loan shall be payable in *not less* than twenty years. The vote undertakes to assess taxes to pay the loan *within less* than twenty years. If the meeting had authority to assess a tax of ten per cent., it could a greater, and sufficient to extinguish the whole debt within twenty years. The language of the warning being thus specific, did not authorize the resolution providing for the "sinking-fund."

There is another objection to this tax, which we think well taken. The statute, ch. 84, § 66, provides that all taxes voted by any town at any annual March meeting, or during that year, shall be assessed on the grand list of the same year; and the sixty-seventh section makes a similar provision as to school-district and village taxes. This court have decided that a vote of a school district in March, 1870, assessing a tax on the grand list of 1869, was void. *Capron v. Raistrick*, 44 Vt. 515. In that case, WHEELER, J., says: "The vote having been passed after the first day of March, 1870, could not lawfully be, and was not, a vote upon any grand list other than the one then to be completed on the 15th day of May following." The evident aim and purpose of the several provisions of the statute,—and they are all consonant to that end,—would seem to be to allow citizens to tax *themselves*, but neither their ancestors nor successors. It would indeed be competent for a town or city to create a debt, which should become payable in some future year, or by installments each succeeding year. But whether such debts shall be paid by taxation, or otherwise, is a matter to be determined by those upon whom the *duty* rests. We think the "sinking-fund tax" of \$9.87, unwarranted and illegal.

III. Was the payment of these taxes, under the circumstances, a *voluntary payment*? The court below have not so found

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as a matter of fact, and we cannot do so as a matter of law. The tax-payer is required by law to pay his tax within one month and eight days after publication of notice by the treasurer that the tax-bill is in his hands for collection; and if not paid within that time, five per cent. is added to the tax, a warrant issues, and cost ensues. We infer from the case as stated, that the term of grace had about expired, and that the plaintiff must elect either to pay the tax, or be subject to the penalty and costs. If the plaintiff was constrained to pay the tax, to save his property from distress, and to avoid a penalty and costs, it was not a voluntary payment. *Babcock v. Granville*, 44 Vt. 326; *Henry v. Chester*, 15 Vt. 469. It is not necessary that the warrant should have been issued, and the levy instant. If he expected, and had a right to expect, that in due course the warrant would issue, and the collection be enforced, with costs; and that unless he complied with the one alternative, he must submit to the other; and he paid *because*, otherwise, the other alternative would be upon him, with protest that he paid because thus *constrained*, it is not such voluntary payment that he would be precluded from recovering back the taxes so paid, if they were illegally imposed.

The court have found that protest was distinctly made to the treasurer, at the time of payment, and a memorandum of that fact made on the receipt, in the presence of the treasurer. The treasurer must have understood that the taxes were not paid in the ordinary course, but that plaintiff insisted that the assessment was illegal, and, by the formal notice, reserved the right, which otherwise would have been waived, to test the validity of the assessment, by an appropriate action.

The judgment of the county court is therefore reversed, and judgment that the plaintiff recover \$29.62 (the amount of the "high school building tax," and the "sinking-fund tax"), and interest thereon from August 14th, 1869; with costs.

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**HORACE AUSTIN ET ALS. v. THE RUTLAND RAILROAD COMPANY,  
JOHN B. PAGE, EDWIN A. BIRCHARD, AND  
GEORGE W. BECKWITH.\***

*Will. Deed. Tenants for Life. Remainder-men. Ejectment  
between Tenants in Common. Railroad Companies. Gen.  
Stat., ch. 28, §§ 17, 26. Riparian Proprietors on Lake Cham-  
plain.*

A will of all the testator's "estate, real and personal," will not embrace land of which the testator was in possession at the time of his death, but of which he had no title, or color of title.

And if one thus in possession of land, procures a deed thereof from another to his wife, the possession held by him thereafter, and by his wife after his decease, is to be referred to the apparent right acquired by such deed, and the color of title given thereby.

There is no privity between one in possession of land under a will, under color and claim of only a life estate, and one in possession after the termination of the life estate, under the same will, claiming in remainder. The remainder-man takes from the testator, not from the tenant for life. Hence the possession of the tenant will not inure to the remainder-man.

A testator willed that all his estate be equally divided, and that his two daughters each have a life estate in a moiety thereof—remainder to their heirs forever. *Held*, that on the termination of the life estates, the heirs of each took a moiety in remainder in fee.

*Held*, also, that the will contemplated, in the matter of determining the rights of the owners of the successive estates, that the division to be made should be such as the law provided for, unless made by the respective successive owners.

Tenants for life cannot make partition of the estate, binding upon those entitled in remainder.

A railroad company, owning one undivided moiety of land in fee, [and the life estate of A. in the other moiety thereof, being in the exclusive possession, duly located their railroad thereon, and appropriated the whole thereof for the ordinary, necessary, and legitimate purposes of the road, and continued to thus use and possess the same after the termination of said life estate, to the exclusion of the remainder-men, and without the appraisal, or payment, of land damages under the statute, or otherwise, to the remainder-men. *Held*, that on account of the peculiar and extraordinary character of the subject-matter of the case, the remainder-men could not maintain ejectment against said company, to recover joint possession of said premises.

Sec. 17, ch. 28, Gen. Stat., contemplates that land may be taken for a railroad, and damage thereby sustained, before any appraisal of land damages shall have been made; and *semble*, that cases like the present were not intended to be subject to any of the provisions of the statute for the appraisal of land damages before the construction of the road.

Sec. 26 of the same chapter, affords a remedy in cases where a railroad company has taken possession of land for the construction of their road without paying the land damages, or having them appraised, and supercedes the common remedy by ejectment, which is available in ordinary cases between tenants in common.

Owners of land bordering on the waters of Lake Champlain, have no title to the soil beyond low water mark, nor right appurtenant, but only a statutory right, to build wharves and store-houses into the lake, in front of their land. Therefore, if land be made by a stranger by filling in earth in front of their land, from low water mark into the lake, and wharves and docks be built thereon, they cannot maintain ejectment therefor.

\* This case was decided at the January term, 1872.

**EJECTMENT** to recover certain premises in Burlington. Plea, the general issue, with notice of special matter of defense. Trial by jury, April term, 1871, PIERPOINT, Ch. J., presiding.

The plaintiffs gave in evidence the original charter of Burlington, granted June 7, 1763, by which it appeared that said township was bounded west on "the shore of Lake Champlain," and was granted in seventy-two shares, of which one share was granted "for the benefit of a school in said town"; also, the proprietors' records of said town, by which it appeared that by a 7th division among the proprietors, water lot No. 10 was set to said school right, and was described as containing twenty rods of land, bounded on the north by the south line of South (now Maple) street, east by the west line of Water-street, being 50 links in width on said Water-street, and bounded "west by the waters of Lake Champlain." Water lot No. 9, by the same division, was set to the right of John Willis, Jr., one of the original proprietors. This lot is of the same size as No. 10, adjoins No. 10 on the south, and has the same western boundary. The plaintiffs' evidence, not contradicted, tended to prove that, early in the year 1800, the selectmen of Burlington leased to Richard Fittocks, "as long as wood grows and water runs," said water lot No. 10, at a rent of one dollar and fifty cents, payable on each first day of January thereafter, and that this rent had been annually paid by the successive occupants of said lot to the present date; that said Richard Fittocks went into possession under said lease, and built a dwelling-house and a store-house on the easterly part of said lot, and that his dwelling-house extended partly upon said lot No. 9; that he enclosed the easterly half of both said lots with a fence, and occupied what was within such enclosure as a garden and orchard, having filled in some part of No. 9 for that purpose, which was, before, low and swampy; that his business during that time was unloading vessels with a large scow which he had in the lake there; and that he occupied said lots in the manner stated until his death, which occurred August 17, 1810; that he left a will, which was duly proved, admitted to probate and recorded September 4, 1810, devising his estate therein as follows:



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"I will that all my just debts and funeral charges be paid. *Item.* I will the one-third part of my estate, real and personal, to my beloved wife, Peggy Fittocks, during her natural life, in lieu of her dower, and that the residue of my estate, real and personal, be chargeable with the maintenance of my said wife, provided the said one-third part shall not be sufficient therefor, so long as she shall remain my widow. *Item.* I will that all my estate, real and personal, of every description, excepting what is above bequeathed to my wife, Peggy Fittocks, be equally divided, and that the use, improvement, and occupancy of the one moiety thereof, be had, held, and enjoyed, by my eldest daughter, Avis,—and the other moiety, by my youngest daughter, Nelly, during their natural lives; also, that part above bequeathed to the said Peggy, in like proportions, after the decease of the said Peggy. Remainder, to their heirs forever; and in case either of my said daughters shall die without heirs, her portion of my estate, real and personal, hereinbefore bequeathed, shall be held and enjoyed by the surviving daughter, under the same restrictions, subject to the same descent to her heirs, as hereinbefore set forth; and in case both die during the lifetime of the said Peggy, without heirs, then the said Peggy shall have, hold, and enjoy, all my estate, real and personal, to her and her heirs forever."

The will and probate was not recorded in the clerk's office of Burlington, until the year 1870. The plaintiff's evidence further tended to prove that the executors named in said will duly made and filed an inventory and appraisal of the estate of said Richard Fittocks, in which was set down and appraised the following real estate only, viz: "13½ acres of land at Red Rock Point," appraised at \$270, and "Water lot laid to school right, subject to rent at \$1.50 a year, with house and store-house on same," appraised at \$250, and the probate records produced, showed an order of the probate court for the sale of the real estate for the payment of the debts of the estate, and the sale by the executors, under that order, of the real estate at Red Rock Point; and showed the whole of the inventoried estate, except said water lot No. 10, to have been administered and disposed of, and the debts paid, and the accounts of the executors settled, November 7, 1820, leaving a balance in favor of the executors, which they remitted to "the widow and heirs, from benevolent motives"; but no further mention was made of said water lot No.

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10, except as above referred to in said inventory and appraisal, nor was any mention made of said water lot No. 9, nor were any proceedings had in the probate court in reference to either of said lots ; that upon the death of said Richard Fittocks, the said Peggy Fittocks, widow, remained and continued to live upon said premises, and the said daughter Avis, having married one Reuben Raxford, went with him into the occupation of the same, occupying the house which Richard Fittocks in his lifetime had built,—the said Peggy Fittocks and Mrs. Raxford living together,—and that the said daughter Nelly, having married one Rufus Austin, went with him into possession of said lot No. 10, he occupying with his buildings the west half of said lot, and also enclosing and occupying the west half of said lot No. 9 ; that said Rufus Austin died about twenty-two years ago, and the said Nelly Austin died January 5, 1870, leaving as their children surviving them, the ten principal plaintiffs named in the writ, and that the female plaintiffs named in the writ, were the wives of the other named plaintiffs, as in the writ described.

It appeared that the said Avis is still living, and is a widow, her husband having deceased many years ago, and that the said Peggy Fittocks died in the year 1827.

The plaintiffs then offered in evidence a certain partition deed, dated April 17, 1824, (duly executed, acknowledged, and recorded), between the said Rufus Austin and Nelly (in the deed called Eleanor) Austin, of the one part, and the said Peggy Fittocks (in the deed called Peggy Chance) and said Reuben Raxford and Avis Raxford, of the other part, purporting to divide said water lot No. 10 between them. To the admission of this deed, the defendants objected for substance, but the court admitted the same, and it was read in evidence.

The plaintiffs also introduced in evidence a deed of said Rufus and Eleanor Austin, to Jireh Durkee, of part of water lot No. 10, dated October 14, 1825, acknowledged and recorded. Also, a mortgage deed of said Rufus and Eleanor Austin of another part of the same lot, to Henry Mayo and Timothy Follett, dated April 24, 1827, acknowledged and recorded.

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These two last named deeds were in the defendants' chain of title, but were introduced by the plaintiffs for the purpose of showing that water lot No. 10 was therein described as a school lot, the original lease and the record thereof being proved to have been lost, and other evidence having been given of the fact by the plaintiffs, not material to be stated.

It was conceded by the defendants, that the defendant Beckwith was in possession of the dock in the declaration described, lying in front of said two water lots, and extending into the lake, and that the other defendants were in possession of the rest of the premises described, and that the Rutland Railroad Company was the landlord of said Beckwith as respects said dock; such possession and title, or claim of title, being as hereinafter set forth.

The plaintiffs gave evidence tending to show a demand of the premises in question, of the defendants, before suit brought, which is not material to be more particularly stated, under the ruling of the court. Upon this evidence the plaintiffs rested their case.

The defendants then put in evidence the charter of the Champlain & Connecticut River Railroad Company, granted November 1, 1843, and the act of 1847, changing the name to that of the Rutland & Burlington Railroad Company, and the location and survey by the directors of said corporation, as by them signed, sealed, certified, and recorded in the town clerk's office of said Burlington, dated January 24, 1846, of lands embracing said water lots 9 and 10, "for depot purposes, and other purposes connected with the northern termination of said railroad," and introduced in evidence tending to show, that said railroad was constructed at this point in the year 1848, and through its whole length by December 25, 1849, and that, ever since, said two lots had been used by said railroad company, and its successors in the management and control, for depot purposes, and other purposes connected with the use of said railroad,—having, during all this time, several railroad tracks crossing the same, and connecting thereby with the Vermont & Canada, or Vermont Central Railroad, proceeding north and east. It was not claimed by the defendants that any appraisal of the lands so taken had been made, nor that the

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plaintiffs had ever received any compensation therefor, but that said railroad company had, after such location and survey, purchased and taken conveyances of said premises from other parties, as hereinafter stated, who were supposed to have title thereto.

All the plaintiffs, at the time of such location and survey, were, and have ever since been, residents without this state. Some of them were then minors, and some were of full age.

As tending to prove the knowledgo of the plaintiffs, of such appropriation by said railroad company, and the acquiescence of the plaintiffs therein, the defendants relied upon the publicity and notoriety of the proceedings, and of the occupation of said premises for the purposes aforesaid, and upon said record in the town clerk's office, and upon the testimony of Horace Austin, one of the plaintiffs, who, on this point, testified in substance, that it was seventeen years ago last fall that he first heard that the Rutland & Burlington railroad was laid upon these lots, and that he heard of it from his folks in Michigan City, when he returned from the army, and had moved to the West; that he heard of the railroad being built at that time, from Mary Ann Dupew and Adam Smith, the daughter and son-in-law of his aunt, Mrs. Raxford. That Timothy Follett, somewhere about the time that Mrs. Raxford conveyed to the railroad company, wrote a letter, either to him, or to his sister, Mrs. Nelson (who was the oldest heir), wanting to know what they would take for the land, but did not state for what purposes he wanted it; and that either he or his sister answered the letter, saying that some of the heirs were not of age, and could not sell it.

The defendants also introduced in evidence a deed from John Collard to Peggy Fittocks, dated April 29, 1805, conveying to her in fee, with warranty, in consideration of five dollars, the "one moiety or equal half of water lot No. 9, laid and drawn to the original right of John Willis, Jr.," with evidence that said Richard Fittocks paid Collard for it. Also, the quit-claim deed of said Peggy Fittocks to Timothy Follett, dated January 13, 1827, of all her title and interest in the same lot. Also, the warranty deed of John Collard to John Pomeroy, dated July 4, 1825, conveying in fee the other undivided half of said lot No. 9. Also,

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the quit-claim deed of John Pomeroy to Henry Mayo and Timothy Follett, dated April 17, 1827, conveying in fee all his right and title in the undivided moiety of said lot No. 9. The defendants, relying in their own behalf upon the two deeds put in evidence by the plaintiffs, viz: Rufus and Eleanor Austin to Jirch Durkee, dated October 14, 1825, and the mortgage deed of Rufus and Eleanor Austin to Henry Mayo and Timothy Follett, dated April 24, 1827, also put in evidence the quit-claim deed of Jirch Durkee to said Mayo and Follett, dated June 27, 1828, conveying all his title and interest in said water lot No. 10 to them. Also, the deed of said Mayo and Follett to Harry and John Bradley, dated February 26, 1835, conveying to them said water lot No. 9, and "the westerly half of water lot No. 10," with warranty, except as to the said annual rent chargeable on No. 10. Also, a deed of said Harry and John Bradley to Timothy Follett, dated April 25, 1835, of one undivided third part of the same premises with warranty. Also, a quit-claim deed of said Harry Bradley to said Timothy Follett and John Bradley, dated January 25, 1841, of all his right and title in the same premises. Also, the deed of said Timothy Follett and John Bradley to the Champlain & Connecticut River Railroad Company, dated September 13, 1847, conveying sundry lands, and among them, said water lot No. 9, and "the westerly half of water lot No. 10," for the consideration received, as expressed in said deed, of seven thousand dollars, with warranty, except as to the annual rent on said lot No. 10. Also, the quit-claim deed of Avis Raxford (then a widow) and her children, viz: Daniel A. Smith and his wife Sophia, Mary Ann Dupew, Dennison Raxford, Nelson Raxford, and Margaret Raxford, to the Rutland & Burlington Railroad Company, dated September 11, 1849, conveying, for the consideration of \$3850, as expressed in said deed, all their right and title in and to "water lot No. 10, so called, on the west side of Waterstreet, with the buildings thereon; also, water lot No. 9, adjoining said No. 10, in the village of Burlington." All the foregoing deeds were duly acknowledged and recorded.

It was conceded that the title, and all the rights of the Rutland & Burlington Railroad Company, had, before the commence-

ment of this suit, passed to, and become vested in, the Rutland Railroad Company, and that the control and management of said railroad, and the rights of said several corporations, had, for the purpose of such management and control, become vested in the defendants, Birchard and Page, as trustees of the second mortgage bondholders of said Rutland & Burlington Railroad Company, by due appointment of the court of chancery. It was also conceded that two of the plaintiffs, children of Rufus and Nelly Austin, were born previous to April 17, 1824.

The defendants' evidence, not contradicted, tended to prove that Mayo, Follett, and the Bradleys, had claimed and occupied the westerly half of No. 10, and of No. 9, from the time of their purchases down to the time of the conveyance by Follett and Bradley to the railroad company; and it was not claimed by the plaintiffs that the said Rufus and Nelly Austin, or Mrs. Raxford, or her children, ever occupied or claimed any part of the premises in question after the date of their respective conveyances.

The defendants then offered to prove that the shore line of Lake Champlain, and the line of low water mark, during the life, and at the death, of Richard Fittocks, was at a point ten rods distant from, and west of, the west line of Water-street, and was at those dates, and ever since, until the building of said railroad, the western boundary and limit of said water lots Nos. 9 and 10; and that in the construction of said railroad, and for the laying of necessary tracks, the Rutland & Burlington Railroad Company had filled in with earth, to the west of said ten rods distance, and into the lake, a distance of 110 feet; and that said Beckwith, defendant, had, at large expense, under a lease and contract from the other named defendants, and by their license, built and extended still further out into the lake, the said dock, from the point to which said railroad company had so filled in as aforesaid. This evidence was objected to by the plaintiff, and the court excluded it.

Upon the whole evidence, the plaintiffs claimed as follows;

1. That the plaintiffs' title to the one half of lot No. 10, was clear.

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2. That the half which the plaintiffs were entitled to recover, was the westerly half, according to the partition deed of April 17, 1824.

3. That the question of the nature, extent and character of the possession of so much of lot No. 9 as was shown to have been occupied by Fittocks and his successors, should be submitted to the jury, and that if found to be exclusive, continuous, under a claim of right, and enclosed by a fence, as the plaintiffs' evidence tended to show, the plaintiffs were entitled to recover one half of so much of lot No. 9 as was so occupied.

The court ruled that, upon the evidence, the plaintiffs were not entitled to recover any part of lot No. 9. To this decision the plaintiffs excepted.

The defendants claimed :

1st. That the plaintiffs were not entitled to recover in the action.

2d. That if entitled to recover, they could recover only the one undivided half of lot No. 10.

3d. That no recovery could be had for the land extending into the lake beyond the boundary of lot No. 10, as it existed at the time of the death of Richard Fittocks, so far as said extension had been made by the works of the Rutland & Burlington Railroad Company.

4th. That no recovery could be had for any part of said dock.

Neither party desiring to address the jury, and neither party questioning the truth of the evidence of the other, so far as lot No. 10 was concerned, the court ruled that the plaintiffs were entitled to recover, and directed the jury to return a verdict for the plaintiffs, the damages in that event being agreed upon, for the seisin and possession of so much of said water lot No. 10 "as lies west of a line parallel with Water-street, and one chain and thirty-six links westerly from said Water-street, together with the dock, or wharf, lying opposite and against said water lot No. 10, and of the same width therewith, and one cent damages and costs." The jury returned a verdict accordingly.

The defendants excepted to the several rulings of the court in the admission of evidence by them objected to ; to the exclusion of the evidence by them offered ; to the refusal to rule upon the 'case as by them requested ; and to the rulings as made.

*Daniel Roberts*, for the defendants.

I. On the plaintiff's exceptions as to No. 9.

Upon the plaintiff's evidence, Richard Fittocks, some time in the year 1800, took possession of lot No. 10 under his town lease, and in putting up his buildings upon the easterly part of No. 10, then or later, extended them partly upon lot No. 9, and enclosed the easterly part of both lots with a fence, and so occupied the east part of both lots. This occupation of No. 9, upon the plaintiffs' evidence, was without title, or color of title, and, we might suppose as a fact, came through a mistake as to the boundary of No. 10. It continued but ten years at most, as he died August 17, 1810, and so did not ripen into a perfect title.

1st. The plaintiffs cannot, in their behalf, add to this the possession of the life tenants, Avis and Nelly, so as to make out a fifteen years adverse possession. *Gourley v. Woodbury et als.* 42 Vt. 395. These plaintiffs are not the successors of Avis and Nelly, do not claim through them, but by an independent title, each party taking a separate estate, and directly from the will of Richard Fittocks, as purchasers. No tenure exists between them. Wms. Real Prop. 188; 2 Wash. Real Prop. 231, 493. Nor trust—Law Rep. 6 Ch. App. 32.

The estate of these plaintiffs under the will, was a vested remainder from the start. 2 Wash. Real Prop. 230, 231; *Blake et ux. v. Stone*, 27 Vt. 475; *Gourley v. Woodbury et als. supra.* The continued possession of the father and mother of the plaintiffs, therefore, if it could grow to a title, would become a title for themselves, and not for the plaintiffs, and could not enure to the benefit of the plaintiffs as claimants under the will. Their possession, being under claim of title as tenants for life, however long enjoyed, could perfect it only as an estate for life, as their possession must be referred to their claim. They must first repudiate their title under the will, before their possession could begin to count as a claim in fee. Again, the plaintiffs do not claim as heirs of Nelly, but by purchase under the will, and so the claim is inconsistent with any title in fee in Nelly, created by fifteen years adverse possession.



2d. Whatever right such possession of the life tenants created, passed, 1st, by the deed of Rufus and Nelly Austin to Durkee, October 14, 1825, and thence to the defendants; 2d, by an adverse possession of No. 9 from thence down. Whatever was gained by an adverse possession by the life tenants, was lost by the subsequent counter possession since 1825.

3d. The possession of Richard Fittocks of No. 9, must be referred to the title of his wife Peggy, under the deed of Collard, of April 29, 1805; and the subsequent possession of herself, and of the life tenants, down to January 13, 1827, when she conveyed to Follett, must be referred to the same title. Richard Fittocks paid Collard, and consented to the deed being given to her. Fittocks' possession must be presumed to have been under an apparent right, rather than without right, and no other right appears. That his possession may have commenced before the date of this deed (if it did), consists with a holding under it. *Brooks v. Chaplin*, 3 Vt. 281.

4th. These facts also amount to a recognition of the title of John Collard to No. 9, through whom the entire estate in undivided moieties has come to the defendants, and estops the plaintiffs, claiming under the will, from denying it. *Hodges v. Eddy*, 38 Vt. 327.

5th. The course taken with No. 9 after the death of Richard Fittocks, shows that it was not understood to have been claimed or possessed by him, except in right of his wife. It was not inventoried nor administered as any part of his estate. It was thereafter possessed by his widow until 1827, when she conveyed it to Follett.

## II. Defendants' exceptions.

1st. That plaintiffs were not entitled to recover. For the present, let it be assumed that the plaintiffs were entitled to an equal undivided half of lot No. 10. If any one of the plaintiffs was not entitled to recover, then this suit must fail. Some of these plaintiffs were of full age at the date of the location and survey of the railroad. All were then, and ever since, residents without the state. This corporation was made subject to the general railroad laws by act of November 9, 1850. Sess. Laws, p. 87. See

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Charter 1848, p. 58. The interest of the plaintiffs as a vested interest in remainder, was susceptible of estimation and appraisal. Gen. Stat. ch. 28, § 20; Comp. Stat. ch. 26, § 24. The setting out of the land for depot purposes, and the survey of the railroad route, with the record thereof, were something more than a possession taken in the way of a survey, &c., as preparatory to an appropriation of the land. It was an appropriation of it, and of the whole title in it, for the purposes of the charter. This was notorious. It was on record, and some of the plaintiffs had actual notice. Seeing this, and not objecting, an assent should be implied, which cannot be revoked. *McAulay v. Western Vt. R. R. Co. et al.* 38 Vt. 311; *Knapp et al. v. McAuley et al.* 39 Vt. 275; *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265, 272.

Nor are the plaintiffs harmed by this rule; for their rights to full damages are reserved to them, and secured by a specific lien upon the lands. Charter, § 7; Gen. Stat. ch. 28, § 17; Comp. Stat. ch. 26, § 20. So too, an action is given by statute to recover full damages when the lands have not been appraised. Comp. Stat. ch. 26, § 30; Gen. Stat. ch. 28, § 26. Again, it may be said that the acts of the railroad company were lawful as to these plaintiffs, or that the plaintiffs had no right to complain of such acts, until after the expiration of the life estate of Nelly. On this theory, the present use of these grounds is lawful to the railroad company, as an owner of the other undivided half. These works were not only rightfully erected, but rightfully continued. The action then is based upon the claim that the plaintiffs are entitled to be admitted to a joint occupation with the railroad company, of these tracks and depot grounds, and that the action of ejectment lies upon the refusal of the company so to admit them. But the possession of the company must be exclusive, for the sake of the public, and cannot be shared with any one else. *Troy & Boston R. R. Co. v. Potter*, *supra*, and cases cited.

2. The court erred in giving effect to the partition deed of April 17, 1824, of the life tenants in behalf of the remainder-man, against the defendants' second request. The case shows that some of these plaintiffs were then in life. The remainder was then vested in them, as children, taking under the denomination of

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"heirs." The contingency which applied to unborn children, became a certainty at their birth. *Blake et ux. v. Stone*, 27 Vt. *supra*; *Smith v. Hastings*, 29 Vt. 240. It is admitted (and the plaintiffs' case rests upon this) that the life tenants could do nothing to the prejudice of the remainder-men. Otherwise, the deed of Austin and wife conveyed the plaintiffs' estate in the west half of No. 10, which was conveyed as a fee. By the same reason, the remainder-men cannot avail themselves of any attempted change in their relations, which might prove to their advantage; and it is absurd to say that this may depend upon the election of the remainder-men, and particularly, as in this case, where a part might elect differently from the other part. The title of these plaintiffs was an undivided interest, each for himself, in the entire lot. It was not competent for the life tenants to change this. The partition deed did not profess to do this, nor to bind the remainder-men. It was a mutual quit-claim of the interest of the parties to it, and of their interest only, viz: their life-estate.

The provision in the will as to a division into moieties, has no force to command an actual division and separation into parcels. Avis and Nelly could do this, or occupy in common, as they should see fit.

Much less does the will contain an authority to Avis and Nelly to make such a division for their children, and such as should bind their children. If any such practical division is enjoined, it is only to regulate the "use, improvement, and occupancy" during the lives of Avis and Nelly. "Remainder to their heirs forever," means, remainder of my *estate* in the entire parcel.

But suppose this will contemplates an actual division in severalty, and that the testator intended that such actual division should be made in advance of the capacity of the remainder-men to enjoy the estate, and perhaps before their birth, and that such division should nevertheless bind them; then there is no authority given to Avis and Nelly to make that division, and unless such authority was given, it does not exist. The law had provided other modes. Stat. 1797. Slade's Stat. 152. Probate Act of 1797. Revision of 1807, p. 127. And to these other modes, this provision of the will must be referred.

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III. As to the land made by the railroad company, and the dock.

This land and dock were outside the chartered limits of Burlington, and outside the limits of No. 10, as specifically given. The bottom of the lake is the property of the state, and not of any individual. *Fletcher v. Phelps*, 28 Vt. 257. And No. 10, as it has come to the plaintiffs, is No. 10 as it existed at Richard Fittocks' death, adding only the natural accretions. The riparian owner has not, at common law, any peculiar rights in the shore of navigable waters. *Rex v. Smith*, Doug. 441; *People v. Titbetts*, 19 N. Y. 523; *Gould v. Hud. R. R. Co.* 6 N. Y. 522; *Lansing v. Smith*, 8 Cow. 146; S. C. 4 Wend. 9; *Paterson & Newark R. R. Co. v. Stevens*, Law Reporter for March 1871, p. 165; 3 How. U. S. 312; *Pres't. &c. of Harvard College v. Stearns*, 15 Gray, 1.

The statute has given a *jurisdiction* to the bordering towns, over the waters of the lake, but has not extended the territorial boundary. Gen. Stat. ch. 15, § 80; *Corinth v. Newbury*, 13 Vt. 496, 500. It has extended no man's boundary into the lake, nor allowed him to go beyond his boundary upon the state's land, except upon the condition that he may have erected a wharf, &c., and extended it from his land into the lake. Gen. Stat. ch. 64, §§ 5, 6, 7. And "the exclusive right to the use, benefit, and control of such wharf, &c.," is limited to him who may have "erected" it, his heirs and assigns. Sec. 7. The right of the shore-owner, under this statute, to build beyond his boundary into the lake, is but a franchise at best, or *right to build*. If interfered with, an action might lie for a disturbance of the right, but not ejectment. In this case, the artificial extension into the lake beyond the original boundary of No. 10, by the railroad company, was by the state's license, and was lawful, as was the building of the dock still further into the lake. These works having been built at great expense, and rightfully, it cannot be that ejectment will lie by these plaintiffs, to be admitted into a joint possession, without even offering to contribute to the cost of the works.

Whatever rights the plaintiffs may have in respect to this made land and the dock, if any, is matter of equitable adjustment upon a bill of equity. *Again*, this made land, over which the

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railroad passes, at the time of the grant of the charter being the property of the state, the charter gave the railroad company the right to pass over it. The land of no private person was taken by this appropriation, and hence there was no occasion for an appraisal of damages. The right given by the statute to the riparian owner to erect wharves, &c., was but a license, adding nothing to the territorial boundaries of the shore-lots, nor adding anything to them as property. As a license, before being acted upon, it was revocable, and was, in legal effect, revoked by the charter and the building of the railroad under it. See cases above cited.

The charter provides that compensation shall be made for the lands "entered upon and used," to "the owners." If the state was the owner, then the plaintiffs were not entitled to compensation. Unless the plaintiffs' land was taken, they were entitled to no damages for any consequential injury. *Hatch v. Vermont Central R. R. Co.* 25 Vt. 49; S. C. 28 Vt. 142.

The first general act giving authority to erect wharves extending into the lake, was the Revised Statutes of 1840. This, in form and terms, is but a license. Before that date, the state had, from time to time, given special license for the same purpose. In 1802, to the Burlington Bay Wharf Co., the exclusive privilege, for 25 years, "of erecting and continuing at Burlington Bay, between the points known as Red Rock and Sharp Shin, a wharf and storehouse." Acts of 1802, p. 193. In 1825, to Messrs. Keyes, of Highgate, the right of extending a wharf "into the waters of Lake Champlain, or Missisquoi Bay, not exceeding 400 feet from low water mark." Acts of 1825, p. 138. Like grants in 1826, to John S. Larabee, of Shoreham, and Calvin Perry, of Swanton. Acts of 1826, pp. 52, 53. The granting of ferry privileges upon the lake, indicates the state's control over the lake. Storehouses and wharves were first made taxable in the towns adjoining such wharves, in 1823. Slade's Stat. 399.

Whatever rights have been accorded to the riparian owner in this country, beyond what the common law gives, stand upon local usage and custom, or legislative grant; as in Massachusetts, upon a colonial ordinance of 1674. 2 Dane's Abr. 693, *et seq.*;

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*Storm v. Freeman*, 6 Mass. 435. In Connecticut, upon an old custom. 7 Conn. 202; 25 Conn. 352. And so in New Jersey. *Railroad Co. v. Stevens*, *supra*.

But this is but an inchoate right, and, as a pure license, revocable. And so it stands under our statute, as under a like statute in New Jersey. *Railroad Co. v. Stevens*, *supra*.

*Wm. G. Shaw* and *E. J. Phelps*, for the plaintiffs.

I. Neither the location and survey of depot grounds by the directors of the Rutland & Burlington R. R. Co., nor the occupation of the premises in question by the railroad company, had any effect upon the rights of the plaintiffs. No appraisal of the land covered by the survey, was ever made; no money was ever paid, tendered, or deposited for the owners of the land; but the railroad company elected to hold the land, not by sequestration and appraisal, thereby taking merely an easement in the land, but by a supposed purchase of the fee by deed, from those whom they erroneously supposed to have the title.

The deed of Follett & Bradley, who held an estate in the Austin portion of the lands, only for the life of Eleanor Austin, affected in no degree the right and title of Eleanor Austin's children. That deed conveyed only such title as Follett & Bradley possessed, viz: a life-estate. The plaintiffs' title, then, did not pass to the railroad company by Follett & Bradley's deed. When the title is not conveyed by deed, payment of land damages is a condition precedent to the acquiring of title by the company, except when such condition is waived by the land owner. *McAulay v. Western Vt. R. R. Co.* 33 Vt. 311; *Knapp v. McAulay*, 39 Vt. 275. The plaintiffs never waived their right to such payment. They were all non-residents, some of them were minors, and it does not appear that more than one of them knew of the occupation of the land by the railroad, previous to the commencement of this action, and that one did not hear of it till 1853, and then, only at the West, as a matter of hearsay. No notice of the fact was given them, nor any communication on the subject had with them by the railroad company. Moreover, they had no title upon which they could make a claim, or interfere with the posses-

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sion of the company, until their mother's death in 1870. The railroad company possessed their mother's title, and during her lifetime, they might do what they pleased with the land, provided they committed no waste. This case bears no analogy in fact to the McAulay cases, above cited.

II. Having lost nothing by waiver of the payment of land damages, it is clear the plaintiffs have title in fee to some portion of lot No. 10, and the question is, are they tenants in common of the whole lot with the Rutland R. R. Co., each owning an undivided interest, or do they own in entirety and severalty the western part of the lot? We insist that they are the sole owners of the western portion. The will of Richard Fittocks provides that his estate shall be equally *divided* into two moieties, one moiety to go to his daughter Avis for life, and the other, to his daughter Nelly (Mrs. Austin) for life, *remainder to their heirs forever*.

The *division* of his estate was provided for by him, and was to precede the use and occupancy by his daughters, of their respective shares. He did not intend that his daughters should take *undivided* shares, and be tenants in common; but he required a partition of his estate, which is certainly inconsistent with a tenancy in common. This division he intended should affect, not only the title of his daughters, but also of their heirs; the share which each took for life, was to go in fee to their heirs; the grandchildren were to have only that divided part which their respective mothers took.

Adopting the other construction, if Mrs. Raxford left but one child, and Mrs. Austin, ten, the Austin children would take ten elevenths of the fee, and the Raxford child but one eleventh. Indeed, if the construction prevails that the plaintiffs take only an undivided interest, as the case shows that Mrs. Austin has left ten children, and Mrs. Raxford has but five, we claim that the plaintiffs are entitled to recover ten undivided fifteenth parts of the lot. If the heirs do not respectively take the fee of the parts of the lot in which their mothers have had their life-estate set out, they must take the remainder *per capita* and not *per stirpes*. But the error of this construction is plain, because, under it, supposing

Mrs. Raxford and her children had not conveyed their title, what title would the plaintiffs take after their mother's death, their aunt Raxford still surviving? They could not be tenants in common with Mrs. Raxford, because her interest is but for life, and covers but the eastern portion of the lot, while theirs would be in fee. They could not be tenants in common with Mrs. Raxford's children, because the latter would have no right whatever to the premises during their mother's life. *Nemo est hæres viventis*.

III. The court properly rejected the testimony offered by the defendants in regard to the extension of lot No. 10 into the lake by the railroad company. Though the lot extended only to low water mark, yet, incident and appurtenant to the lot, was the right of filling out into the water, either by earth, timber, or other material, to any extent not inconsistent with the public right of navigation. The filling in with earth is the same in principle as the building of a wharf. This right of wharfage, by immemorial custom in this country, is the property of every owner of land on the shores of the great fresh-water lakes and tideless navigable rivers of America, whether it existed by the common law upon the navigable waters of England, or not. It is a right essential to the value of the water-front, and greatly tends to the encouragement of navigation and commerce.

It is settled, even in England, that there is no public right of landing on the shore of the sea. *Blundell v. Catterall*, 5 B. & Ald. 268; much less is there such on the banks of our lakes and rivers. Therefore, unless the right of wharfage exists in the proprietor of the land extending to low-water mark, the right of landing, or embarkation of goods and passengers, cannot be obtained either from the state or the proprietor, for the right of the state to land under the water, carries no right to the land above low-water mark. *East Haven v. Hemingway*, 7 Conn. 186; *Champion v. Kimball*, 9 Conn. 37; *Frink v. Lawrence*, 20 Conn. 117; *Barrows v. Gallup*, 32 Conn. 501; *Dutton v. Strong*, 1 Black, 23, 32; *Railroad Co. v. Shurmer*, 7 Wallace, 289; *Gates v. Milwaukee*, 10 Wallace, 504; *Bainbridge v. Sherlock*, 29 Ind. 364.



Wharves have existed on the Vermont shore of Lake Champlain since the first settlement of the state, and they were always built, and owned, by the owner of the land from which they were extended into the lake; nor was any special grant or license for that purpose obtained from the state. The usage is as immemorial in Vermont, in proportion to the age of the state, as in Connecticut. The statute (Gen. Stat. 447), which first appeared in the revision of 1839, giving to land-owners on the border of the lake, the right to wharf out into the water, conferred no new right, but was simply confirmatory of the common law of America. But if it were not so, and if it gave a new right which did not exist before, it constituted a grant to all riparian proprietors, and from that time forth, this right was incident and appurtenant to all lands so situated. A similar right is held to exist throughout Massachusetts, by virtue of an old ordinance of the Colony of Massachusetts Bay, passed in 1647, notwithstanding that colony did not embrace all the ocean-front of the present Commonwealth of Massachusetts.

This right being appurtenant to the lot, it belonged to the owner of the lot. A mere trespasser could gain no right to a wharf built by him against the lot, except by the lapse of time necessary to give title by adverse possession. *Nichols v. Lewis*, 15 Conn. 136. But in the present case, the railroad company, when they extended lot No. 10 into the water, and when Beckwith built his wharf, had an estate in the west part of that lot, and, of course, to the wharfage right appurtenant to it, for the life of Mrs. Austin, and no longer. When she died, their right to the lot, and all appurtenant easements, including this wharf, ceased, and the remainder-men, these plaintiffs, took the west half of the lot, with all improvements. All erections and improvements by a tenant for life, which are in existence when that tenancy ceases, belong to the owner of the fee.

If the defendants have, in good faith, believing they had a complete title in fee to this lot, made valuable improvements upon it, their sole remedy is under the betterment law. If, on the other hand, the plaintiffs have only an undivided interest in lot No. 10, they have also an undivided interest of equal extent in the

wharf. Improvements made by one tenant in common upon the undivided estate, enure equally to the benefit of his co-tenant. 1 Wash. Real Prop. 437. Ejectment will lie for the extension of lot No. 10 into the lake, and for the wharf, as well as for the lot in its original dimensions. *Nichols v. Lewis*, 15 Conn. 136.

IV. The court erred in deciding that the plaintiffs were not entitled to recover any part of lot No. 9. To this lot the defendants only deduced title from John Collard, in whom no title whatever was shown, and who, so far as appears, never had any possession. The deed from him was a quit-claim, upon nominal consideration. The case stands, therefore, on the plaintiffs' title.

The character of Richard Fittocks' possession of that lot, and the absence of any evidence to the contrary, show that it was under a claim of right. As the lots were without visible boundary or division, and of small value, he undoubtedly regarded both as belonging to No. 10, and, obviously, so treated them.

His will devised "all his real estate," and plainly referred to all he had thus occupied. Under the will, and in accordance with its provisions, his widow and children continued to occupy both lots after his death, for at least seventeen years; the widow and one daughter occupying the east half, and the other daughter and her husband, the parents of the plaintiffs, occupying the west half of both. When the land was divided between them by the deed of April 17, 1824, as required by the will, both lots were divided as they had always been occupied. Upon this evidence, it cannot be questioned :

1. That the possession of Richard Fittocks and his devisees, was of such a character and continuous duration, as to give them a title in fee to lot No. 9.

2. That the possession of the devisees was *under the will*, both in fact, and by construction of law. So that their title was determined by the provisions of the will; the children taking a life estate, with remainder to the grandchildren.

And if, upon this evidence, there could be any question as to the character of the possession, either before or after Richard Fittocks' death, it should have been submitted to the jury in accordance with plaintiffs' third request. It is said that, as Richard

Fittocks' possessory title had not ripened into an absolute fee at the time of his death, because it was only ten years old, the subsequent possession of his devisees for five years longer, would give them a title, not under the will, nor in accordance with its provisions, but an independent title in fee, adverse to that conveyed by the will. But this proposition will not stand examination. It is *because* the devisees take under the will, that they are allowed to add the possession of the deviser to their own. If they held adversely to the will, fifteen years fresh possession would be requisite to give title; but that they obtained a perfect title by five years additional possession, is not questioned.

The interest of Richard Fittocks in the land, was clearly such as could be devised by will; it was so devised. The devisees who accepted the devise, and claimed under it, are bound by its terms, and must hold for the benefit of the title thereby conferred, and not adversely to their remainder-men.

Another view of the subject is decisive. The ten years actual occupancy of Richard Fittocks, being the first possession ever taken of the land, was, upon the evidence in the case, such a *prior possession* as gave him a title, even though fifteen years had not elapsed. *Dookittle v. Linsley*, 2 Aik. 155. He therefore owned the land in fee at the time of his decease, and it passed by his will to his grandchildren, on the expiration of the life-estate previously limited. Pending that life-estate, no adverse possession could run against the grandchildren.

The opinion of the court was delivered by

BARRETT, J. In this case the plaintiffs claim to recover possession of the premises in question, by reason of their title to an estate in remainder, under the will of their grandfather, Richard Fittocks. In 1800, said Richard took a perpetual lease of water lot No. 10. Adjoining it on the south, was water lot No. 9. He took possession under said lease, and built a dwelling and storehouse on the easterly part of No. 10, the dwelling-house extending partly upon No. 9. He enclosed the easterly half of both of said lots with a fence, and occupied what was within said enclosure as a garden and orchard, having filled in some part of No.

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9 for that purpose, which was before that time low and swampy. He occupied said lots in the manner stated till his death, August 10, 1810.

I. *As to No. 9.* It appears that he occupied only the easterly half, which was separated from the other half by the fence made by him when he began to occupy. Of that lot, he had no *color* of title. Hence his possession was limited to what he enclosed and occupied. At his death, he had acquired no title to any part of that lot. His will purports to embrace only his *estate, real and personal*. He then had no estate in No. 9. Moreover, in 1805, he paid John Collard for half of the lot, and took a deed of warranty of it to his wife. After the taking of that deed, the possession held by himself, and by his wife after his decease, is to be referred to the apparent right acquired by said deed, and the *color* of title given thereby. *Brooks v. Chaplin*, 3 Vt. 281; *Ford v. Flint*, 40 Vt. 382; *Hodges v. Eddy*, 38 Vt. 327, 348.

Peggy Fittocks must be regarded as having been in possession after the death of her husband, under the deed of Collard, and not under the will of her husband, which will, as before remarked, did not purport to embrace No. 9 at all. She parted with her title to that lot, January 13, 1827, which title, together with the title and interest of her daughter Avis and children, in both No. 9 and 10, have been held by the defendant railroad company for several years.

In the other half of No. 9, the plaintiffs do not show that they have any title or interest. They claim in remainder under the will of their grandfather, upon the termination of the life-estate of their mother in 1870. It would be sufficient in this respect to say, that no part of No. 9 passed by the will. Yet it may properly be added that, if their mother Nelly supposed her possession, after the death of her father, to be under his will, still, she was in under color and claim of only a life-estate. So there could be no privity between her and the plaintiffs, who are claiming in remainder after the termination of that life estate under the same will. They take the title of, and from, the testator, and not of, and from, their mother. But again, it is not shown that her possession was for the period required in order to work a perfected

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title in her, even if it was adverse as against all other rights, and could have enured to the plaintiffs. Finally, it appears that Mayo, Follett, and the Bradleys, had claimed and occupied No. 9, from April 17, 1827,—the date of Pomeroy's deed to Mayo and Follett, of the premises conveyed to Pomeroy by John Collard by deed of warranty dated July 4, 1825,—and that their interest and title have been in the defendants for several years, who, in virtue of such interest and title, have continued in uninterrupted possession. Such occupancy, with such title as was derived from Collard through said Peggy Fittocks, and said Pomeroy, gave the defendants a perfected title to lot No. 9.

II. *As to No. 10.* The first question is, whether the plaintiffs own the west half of said lot, or are owners in common with the railroad company of an undivided moiety. They are owners in common, unless the instrument of partition between the tenants for life, effectuated a partition between those who took in remainder on the termination of the respective life-estates of said Avis and Nelly. We are satisfied that, as Avis and Nelly were each to have a life-estate in a moiety, so the heirs of each one were to take a moiety in remainder in fee. But we find no warrant for holding that said tenants for life were authorized to make a division that should bind those entitled in remainder, or that the division which might be thus made should be operative beyond the rights of the parties to such division. Such division as was made by them, was valid and effectual as to their respective rights as tenants for life. And yet it does not appear that in fact such division was into moieties—"equally divided"—in the sense in which those in remainder would be entitled under the will.

That instrument of partition was made April 17, 1824. On the 14th of October, 1825, said Nelly and husband parted with their title, in part, to Durkee, and on the 24th of April, 1827, they parted with the rest to Mayo and Follett, since which time, in the language of the exceptions, "it was not claimed by plaintiffs that said Nelly and Rufus ever occupied or claimed any part of the premises in question."

These plaintiffs, then, must stand upon the provisions of the will, as against the other co-owner in remainder under the will.

And it seems plain to us that the will contemplated, in the matter of determining the rights of the owners of the successive estates, that the division to be made was such as the law provided for, unless it should be made by and between the respective successive owners.

III. On the decease of said Nelly Austin on the 5th of January, 1870, the plaintiffs succeeded in remainder to their rights of ownership, in common with the defendants, of an undivided moiety of said lot No. 10. As the defendants were holding a title in fee under Avis and her children, and a life-estate under said Nelly, it is conceded that they rightfully held the exclusive possession of the whole of said lot up to the termination of said life-estate of Nelly. During such rightful exclusive possession, the railroad was duly located upon said lot, and the whole of it was thus appropriated, and has ever since been held and used, and it still continues to be held and used for the ordinary, necessary, and legitimate purposes of the railroad, in exclusion of the plaintiffs from the possession, occupancy, and use thereof. There has been no appraisal or payment of land damages to the plaintiffs under the statute, nor in any other way. Upon this state of facts, it is claimed that the plaintiffs may maintain ejectment in virtue of their rights as tenants in common with the defendants. To this claim we are not able to assent. The defendants, in the language of the plaintiffs' brief, "during the life of said Nelly, might do what they pleased with the land, provided they committed no waste." Being in possession, with such title and right, it was legitimate for them to locate and make the railroad as it was done, and to continue it, without payment of damages to any body, up to the time that the plaintiffs could assert a right in themselves as against the defendants. It was incident to the tenure of the defendants, as well as to the title and estate of the plaintiffs, that the railroad might be located, made, and used, without payment of damages to the plaintiffs, during the period of the defendants' right to exclusive possession, by reason of such tenure. There was no life-tenant to be regarded. There was no remainder-man to be regarded, till such remainder-man's right to claim possession was available to him.

We think, then, that all the reasons for what was held in the cases of McAulay and the railroad, in 33 and 39 Vt. Reports, and in *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 272, apply with unabated force in the present case. Saying nothing as to the matter of knowledge and implied assent on the part of some of the plaintiffs, upon which a point was made in the argument, it would seem that, when the defendants, in the exercise of their lawful right, as against these plaintiffs, located and made their road on the lot in question, they should no more be subjected to being ousted, or to having the plaintiffs let into co-possession, than in case the plaintiffs had been absolute owners of the whole lot throughout, and had assented to the doing of the same without first having the damages appraised and paid.

In the cases referred to, the point of the reason against permitting the land-owner to eject the corporation, or to be let into possession, joint, or otherwise, is, that the corporation had done a lawful act in locating and making the road through the land in question, without first having the damages appraised and paid. In those cases, the lawfulness of the act resulted from the consent of the land-owner. In the case before us, the act was equally lawful, it having been done by the party lawfully in possession, and who might lawfully do it by reason of his title and estate in the premises. This being so, we think it would contravene both the reasons and the rules that have had operation and force on this subject, now to hold, that the lately accruing right to the plaintiffs of availing themselves of their estate in the premises, changes what the defendants have done in locating, making, and maintaining their railroad, into a wrong as against the plaintiffs, and the exclusion of them from a co-occupancy, into such an unlawful ouster, as to entitle them to maintain this action. On the other hand, the provisions of the statutes seem plainly to indicate the legislative sense of the state to be in harmony with the judicial sense, as manifested in the decided cases involving the subject. Sec. 17, ch. 28, Gen. Stat., which makes provision for the appraisal of land damages, in case the parties do not agree about them, contemplates that land may be taken, and damage thereby sustained, before appraisal shall have been made; and it pro-

vides for the appraisal and payment of damages in such cases, as well as in others.

In this connection it should be remarked that the provisions of the statute for the appraisal of damages before the railroad can be lawfully made, do not seem to contemplate, or to be adapted to, a case like the present. This case does not fall within the terms, or the meaning, of sec. 20 of that chapter, which section is applicable only to cases in which damage to right of dower, or estate for life, or years, is to be appraised. Here was no estate for life to be damaged, for it was owned by the defendants; and so it was not a case for appraising damages to the interests in remainder. Indeed, the inapplicability to this case of the other incidental details in the provisions for the appraisal of land damages before the making of the road, enforces the idea, that cases like the present were not intended to be subject to those provisions.

When we turn to sec. 26 of the same chapter, it is seen to be full and explicit in provisions for such cases. Thus: "In every case where a railroad company have entered upon, taken possession of, and used, land and real estate for the construction and accommodation of their railroad \* \* \* and shall not have paid the owner therefor, nor, within two years from such entry, had the damages appraised, &c., the ordinary courts of law shall have jurisdiction thereof, to wit: justices, &c. and the county courts, &c.; and any person claiming damages may bring suit therefor in the usual form, &c.; and shall recover only actual damages." This seems to contemplate that the company might have two years after such entry, taking possession, and using, in which to get such damages appraised, pursuant to the provisions of sec. 17. It seems difficult to suppose that it was contemplated at the same time, that, *in the mean time*, they should be liable to be ousted by action of ejectment. We think that the alternative remedy provided in sec. 26, clearly indicates that, after the lapse of said two years, without such appraisal having been made, not by ousting the company by action of ejectment, but by suit for damages, the land owner is to get what he would have realized as the fruit of the proceeding provided in sec. 17.



These provisions of the statute seem to recognize the peculiar character of the subject-matter, much as the court, have recognized and regarded it in our own, and in other states. A most marked instance of such recognition is the case of *Sturgis & Douglass v. Miller & Knapp*, 31 Vt. 1. The same is true of the other cases above referred to. We concur, then, in holding that, in this case, as it is now before us, the plaintiffs are not entitled to have a judgment giving them co-possession with the defendants of the land in question.

In the views thus presented, we design to propound the law only of the present case, leaving cases made up of other elements, and characterized by different features, to abide such consideration as may seem meet when they shall be before the court for adjudication. In holding as we do in this case, we are not unmindful that a party in ordinary cases, unaffected by peculiar statutory provisions, would be entitled to maintain ejectment against his co-tenant when wrongfully excluded from the possession of the common property by such co-tenant. We put the decision on the ground, as above indicated, that the subject-matter (when regarded with reference to the law ordinarily governing the action of ejectment, in its origin and development) is extraordinary and peculiar; that the property was lawfully put to its present use by the defendants, as against these plaintiffs; that special statutory provision is made for ample remedy in such case; and, having reference to the public interests involved in, and affected by, the construction and operation of railroads, and in view of what has been held in other cases, standing upon the same reasons, it is fairly to be assumed that such statutory provision for remedy, was intended to supersede the common remedy by action of ejectment, which is available in ordinary cases between tenants in common.

We have not deemed it advisable to enter upon a discussion of the question, whether the plaintiffs would have a lien for the damages recovered by them under said § 26, as our attention was not called to it in the argument, except by a passage in the brief for the defendants, that "plaintiffs' rights to full damages are reserved to them by a specific lien on the lands,"—citing said §§ 17 and

26, Gen. Stat. ch. 28. Of course, aside from such resource, they would have all the rights of any judgment creditor for enforcing judgment against a judgment debtor.

IV. It is claimed for the plaintiffs that the land and dock that have been made by the defendants into the water of the lake further west than the land extended naturally, are embraced within the estate which they own under the will of their grandfather.

The township, by the charter, was bounded west "on the shore of Lake Champlain." The lot was bounded "west by the waters of Lake Champlain." In the year 1800, that lot, thus bounded, became the property of said testator. It remained unchanged in that respect, and in the condition of its water-front, during the life of the testator, and up to the time when the defendants made said additions of land into the water of the lake. Neither the testator, nor any one under him, made any erections or structures on the water-front in the character of pier, dock, wharf, or store-house, so nothing had been done in the nature of asserting or exercising any right in those respects, as appertaining to that lot, in reference to the lake, for any purpose. The testator enclosed and occupied, during his life, only the east half of said lot. Defendants' counsel understand that lot No. 10 extended to low water mark, and that the estate of the plaintiffs extends to the same line. The right of the plaintiffs is thus conceded to the utmost limit of title and ownership in the soil known to the law, as shown by the text books and decided cases, whether in the nature of a corporeal or incorporeal hereditament. All that can be claimed for the plaintiffs, as the ground of their alleged title and interest in the made land, is the right that the owner of said lot, as it originally was, had to pass to and from the water of the lake within the width of the lot, as it bordered on, and was washed by, said water. It is not denied that the lake is "navigable water," in the sense of the law governing public and private rights in respect thereto. There is no occasion, therefore, to discuss, or decide, whether the common law of England, or of Massachusetts, or of Connecticut, or of any other state, is the common law of Vermont, as to such rights. We remark, however, that there is no *common law* of Vermont, by which the owner of land bounded

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on Lake Champlain, has a right beyond low water mark to appropriate as his own the bed of the lake. Neither the legislature nor the courts have recognized any such right, only as it has been conferred by act of legislation. And the whole course of legislation on the subject indicates that there was no such right by any kind of common law in this state. See act of 1802, granting to the Burlington Bay Wharf Co. the privilege of erecting and continuing a wharf; also the act of 1825, giving the right to Messrs. Keyes to extend a wharf into the lake from low water mark; also acts No. 41 and No. 42, in 1826, of a similar character.

The matter had thus proceeded up to 1839, when, in the Revised Statutes of that year, § 7, ch. 59, it was enacted that "all persons who may have erected any wharves, &c., agreeably to the provisions of any grant heretofore made, or agreeably to the provisions of this chapter, their heirs and assigns, shall have the exclusive right to the use, benefit and control of such wharves, &c., forever." This seems plainly to show the idea of the legislature to have been, that the right to build a wharf, or any other structure, beyond the land of the riparian owner into the water of the lake, depended on a legislative grant, either shown or presumed. And the same is as clearly shown by the preceding § 5, viz: "Any person owning lands adjoining Lake Champlain may erect any wharf or store-house, and extend the same from the land of such person in a direct course into Lake Champlain \* \* between the lands of such person and the channel of the lake." This contemplates that the right to build into the lake "*from the land,*" &c. is given by that provision of the statute.

There is no ground for claiming that those general legislative enactments were only in affirmance of already existing common law of the state; for, not only does the fact of such legislation and the terms and provisions of it, discountenance such claim, but the special legislation that preceded it, and which is emphatically recognized in said § 7, ch. 59, Rev. Stat., is altogether inconsistent with it.

The right, then, that existed in the testator as owner of lot No. 10, was not a right *appurtenant* to the lot to build into the lake in front of it. He had only, and at most, so far as the lake was

concerned, a right, in common with all other persons, to use the waters of the lake in any proper way, and for any proper purpose. As the absolute owner of said lot, he had the exclusive right to use it in passing to and from the lake. But this gave him no peculiar or additional right as to the lake itself. Of course it could not give him title to erections or structures made by others beyond the limits of his own land. If, in making such erections and structures, others should violate any right of his, as owner of the land to low water mark, he could seek redress in some proper way, but not by action based on his right as the owner of them. If they should be a nuisance in the legal sense, the abatement of them might be invoked by a proceeding proper for that purpose. The doctrines of the law as applicable to this feature of the case, are well developed and applied in *Gould v. Hud. Riv. R. R. Co.* 2 Seld. (6 N. Y.) 522, and in *Pres't, &c. Harv. Coll. v. Stearns*, 15 Gray, 1; also in *Pat. & New. R. R. Co. v. Stevens*, Law. Reg. March, 1871, p. 165.

In those cases the learning of the subject is so amply embodied, analyzed, and applied, that little would be gained by repeating what has been done by the learned courts in the decisions referred to. The case of *Nichols v. Lewis*, 15 Conn. 136, is not at odds with the views which we hold in the case in hand. In that case it was held, that the plaintiff owned a tangible property between high and low water mark, where the tide ebbed and flowed, of which he was entitled to the possession as against the defendant, by whom he had been ousted, and that he could recover by ejectment the possession of the *locum in quo*, notwithstanding the defendant had made on it a dump, or fill of earth,—so far as the dump was concerned, it being put on the same ground, “as if a man builds on another’s land, the building belongs to the owner of the land.” The kind of estate which, in Connecticut, a riparian owner on navigable water, like the plaintiff in that case, has in the shore, is indicated by Ch. J. Hosmer, 7 Conn. 202, in commenting on a passage in Swift’s System. He says: “By this expression I do not understand that the proprietors alluded to were *seised*, but they had a right of occupation, properly termed a franchise.” Those cases were very different from this. Here was no

building *upon* the plaintiffs' land, only an abutting against it by a structure made outside of it. It is not a case of accretion or gradual reliction, which belongs to the riparian owner. It does not fall within the right *usque ad cælum*, for that, of itself, does not often extend more widely than the *solum* of the owner, on which such right must be grounded. Most of the other cases cited by plaintiffs' counsel arose with reference to the right to appropriate and use the shore, the space between high and low water mark, where the tide ebbs and flows. As to rights beyond low water mark, they countenance and maintain our views in this case. In *Blundell v. Catterall*, 5 B. & Ald. 268, it is shown that the exclusive right in the plaintiff, to the shore of the navigable water in question, did not exist except by grant from the crown. In that case the learning on the subject of riparian rights along navigable waters is exhaustively developed by discussion and citation, and entirely in consonance with the present decision.

We have examined the cases cited in the U. S. supreme court reports, and find that none of them maintain a right of soil in the plaintiffs; and that must be maintained in order to entitle them to recover in ejectment the made land in question. The case of *Dutton et al. v. Strongy et al.*, 1 Black, 23, most confidently urged upon our attention by counsel for the plaintiffs, countenances precisely what we hold as to rights beyond low water mark. We cite some passages of the opinion, by CLIFFORD, J., p. 31: "Bridge piers and landing-places, &c., are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, &c., as well as on the lakes; and where they conform to the regulations of the state, and do not extend below low water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation." \* \* \* "Our ancestors, when they immigrated here, undoubtedly brought the common law with them; \* \* but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject, and in some the right of the riparian proprietor rests upon immemorial local

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usage. \* \* \* Wherever the water of the shore (of the lake) is too shoal to be navigable, there is the same necessity for such erections, as in bays and arms of the sea ; and when that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it ; but the right must be understood as terminating at the point of navigability, when the necessity for such erections ordinarily ceases." The question in that case was, whether the defendants, who had built such a pier on the shore of Lake Michigan, had such a property right in it as to entitle them to prevent the plaintiffs from causing its destruction by hitching their vessel to it in stress of weather :—a very different question from that of right of soil in land made by another, outside of the testator's water-front of low water mark, into the body of the lake. The other cases cited need no comment, for it is not claimed that they are more in point than those noticed above.

According to the foregoing views, the exception taken by the plaintiffs is not maintained. On the defendants' exceptions, the judgment is reversed. The cause is remanded.

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### FLANAGAN & ADAMS v. ALSON H. POST.\*

[ IN CHANCERY. ]

#### *Rights of Co-sureties.*

Where several sign a promissory note, and one of them is the real principal, the others, *inter sese*, are, *prima facie*, sureties of the principal, and co-sureties of each other, and the burden of proof is on the party alleging the contrary.

A security from a principal to one surety, enures, by operation of law, equally to the benefit of a co-surety.

If a principal procure one to sign a note with him as surety, upon the representation that the money raised thereon shall be paid upon debts where the surety is already holden for him, a co-surety is not affected by such representation when the money thus raised is paid on a debt where he is sole surety for the principal, unless he had knowledge of such representation.

M., as principal, and A., F., and P., as sureties, executed a promissory note to raise money to pay a note on which P. was sole surety of M. and the note was delivered to P. to get discounted. P., before getting the note discounted, and on the faith of it, paid the debt on which he was sole surety, out of his own funds. *Held*; that P. was not then bound to cancel the note, or surrender it to his co-sureties.

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\* This case was decided at the January term, 1865.

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**APPEAL** from the court of chancery. The bill alleged that, prior to the 10th day of November, 1860, the orators had severally become the sureties of one Mills upon divers promissory notes then outstanding; that one Alson H. Post was also liable at the same time, as sole surety for Mills, on a note for \$800, then over due and in the Commercial Bank, in Burlington; that Mills, before and at the date afore-said, was, and ever since has been, wholly insolvent, and that the orators never had any security for their several liabilities as such sureties, nor any part thereof; that on or about the 10th day of November aforesaid, and while the orators and Post were so liable for Mills, the orator, Flanagan, at the solicitation and request of Post, as his surety, and relying wholly on him for protection and indemnity, executed and delivered to Post a promissory note for \$800, payable to one Carney Buttles, or bearer, on the first day of November, 1861, with interest,—Post, at the time of the execution of said note, representing to Flanagan, that he, the said Post, desired and intended to use said note for the purpose of raising money with which to pay the note for \$800 at the Commercial Bank, and that he, the said Post, would, as principal, execute the note so payable to the said Buttles; that soon after the last mentioned note was executed, it was taken to the orator, Adams, by Mills, who then stated to Adams, that he, Mills, or Post, had ascertained that money could be obtained of the said Buttles, and he, Mills, desired Adams to sign said note as surety, representing to Adams that Post would also sign the said note as co-surety, and that the money obtained on said note should be used in the payment only of those claims on which Adams was liable as Mills' surety, so that Adams' liabilities for Mills should not be increased by the execution by Adams of said last mentioned note; and thereupon Adams, relying wholly upon the statements of Mills, signed said note, and handed it to Mills, who, soon afterwards, procured Post to sign it (Mills also having signed it himself), and left it with Post; that about a month afterwards, and on or about the 10th day of December, 1860, the said last named note still being in the hands of Post, Mills, by and through the deceitful and fraudulent procurement of Post, applied to the ora-

tors, separately, to sign another note of like amount and tenor, at the same time representing to them that Post would also sign it, and that Post desired them to do so, and that the sole object in obtaining another note, was to save about a month's interest which had already accrued on the first note, and that if they would sign the note last presented, it should be used only as a substitute for the first note so signed by them; that the orators, relying wholly upon these representations and assurances of the said Mills, and fully understanding and believing that the new note was to take the place of the former one, and that their relations to each other, and to Post and Mills, would not be thereby affected, severally executed said new note and delivered the same to Mills.

The bill further alleged, that at the time of the execution by the orators of said last mentioned note, Post did not intend to execute the same, nor that the same should stand in place of, and as a substitute for, the first note; but in procuring Mills to obtain the orators' signatures to the second note, Post fraudulently and corruptly intended to obtain possession of the same, to hold it as security for his liability for Mills, and to compel the orators to pay the whole amount thereof to him; and that he, having received said note as aforesaid, soon afterwards, fraudulently and corruptly offered to sell and negotiate it to one Philander Bradley, with only the names of Mills and the orators subscribed thereto, and endeavored, unsuccessfully, to persuade Bradley to purchase said note without the defendant's name upon it, or with his name endorsed upon the back thereof as endorser or guarantor only, and not as co-maker or co-surety with the orators, and now fraudulently and corruptly refuses to sign or execute said note, and claims to hold the same as collateral security for his, the said Post's, claims against Mills, and threatens to enforce the collection thereof against the orators when the same shall become due.

The bill prayed that Post might be perpetually enjoined from negotiating or transferring the said note secondly executed by the orators as aforesaid, and from commencing or prosecuting any action thereon, or taking any steps whatever for the collection thereof from the orators; and that the said note might be



ordered and decreed to be surrendered and given up to the orators, or that Post might be ordered and compelled to hold and use the same only in the manner and for the purposes, and subject to all the duties and liabilities to which he was subject in respect to the first note so executed by the orators, and payable to the said Buttles.

The defendant in his answer, admitted that in the fall of 1860, he was surety for said Mills at the Commercial Bank, on a note for \$800, and that said note was overdue, as stated in said bill; and alleged, that at the time the first note to Buttles was executed, the said Mills, though actually insolvent, as the defendant now believes, was still doing business at Hinesburgh, and had not, to the knowledge of the defendant, been attached, or otherwise molested, and had property of various kinds in his possession, or ownership; and denied that the orator, Flanagan, ever signed, or delivered to the defendant, any note for \$800, or any other sum, at the defendant's request, or upon the defendant's indemnity, or obligation in any form to see the said Flanagan harmless in respect thereto, and denied that any note was ever substituted for any such note, and denied all knowledge of what transpired between said Mills and the orator, Adams, as to any such note, or any note, as stated in said bill; and alleged that at or about the time of the date of the note first executed to Buttles as aforesaid, the note of said Mills for \$800, signed by the defendant as surety, lay in said bank overdue, and in order to arrange the same, it was mutually agreed between said Mills and the defendant, that Mills should make a note for that sum, on one year, to said Buttles, from whom the defendant expected to raise money, and procure the orators to sign it as sureties, and deliver it to the defendant for his own use, and the defendant agreed, in such event, to arrange, settle up, and pay the said bank note, and also to sign said Buttles' note himself, as co-surety with the orators; that thereupon said first Buttles note was so procured by Mills, and delivered to the defendant in pursuance of said agreement, and that the defendant had, in the meantime, arranged and agreed with said Buttles for \$800, to be raised on such note; that the defendant received said note upon

the express consideration of his assuming the burden of taking up said bank note, and in perfect good faith, and without any such agreement, terms, or understanding, as is stated in said bill ; that the defendant did this in lieu of taking other security from said Mills, as he then might, and would have done in respect to said bank note ; that before the defendant could actually get the money, or its equivalent, on said note from said Butties, though said Butties had agreed to let him have it, some little time elapsed, the defendant holding said note under the agreement aforesaid, and therefore, afterwards, and about the 15th or 20th of December, 1861, as a mere matter of accommodation to said Mills, to give him a longer time for payment, and as a substitute for said first note, the defendant received from said Mills another note for \$800, signed by the said Mills and the orators, payable to said Butties, in one year, and this last note was given and received upon the same terms and agreements, above stated as to said first note, and in good faith, and in the belief by the defendant that he had a right to do so ; and that the defendant so received said second note in lieu of said first note, and immediately, on the faith thereof, omitting to take or obtain other security from said Mills, which he otherwise would have done, did pay and take up said bank note, and did thereupon sign his own name to said last named note as co-surety with the orators, according to said previous agreement and understanding with said Mills ; and that the defendant, pursuant to said agreement with said Butties in the premises, did sell and transfer to said Butties said last named note, and received the full value and amount thereof from said Butties before the commencement of this suit ; and denied that he ever, fraudulently, or otherwise, attempted to negotiate said second note to said Bradley, or that he refused to execute said note ; and alleged that prior to the commencement of this suit, he signed said note and parted therewith according to the original agreement aforesaid.

The answer was traversed, and the case was heard on bill, answer, traverse, and testimony, at the April term, 1864, *Pierpont*, Chancellor, and a decree entered dismissing the bill with costs ; from which decree the orators appealed.

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*E. R. Hard and Ballard*, for the orators.

*George F. Edmunds and Nahum Peck*, for the defendant.

The opinion of the court was delivered by

PECK, J. The case stands upon bill, answer, traverse, and testimony. By reference to the bill and answer, it will be seen that the facts in dispute, and on which the relative rights of the parties depend, are few. It appears that at the time the promissory note in question was executed, the orators were severally sureties for one Mills, and that Mills has since failed, without fully indemnifying the orators, and that the defendant, Post, was at the same time surety for Mills upon an \$800 note to the Commercial Bank, then overdue. There is no dispute but that the second note, the one in question, was signed with the understanding that it was a substitute for the first, which was never used, but given up to Flanagan soon after the second note was executed and delivered to Post; so that the principal question of fact in dispute affecting the ultimate rights of the parties, is, whether Post agreed to sign the note as principal, as between him and the orators, or either of them, or merely as surety for Mills, and co-surety with the orators. It is agreed on all hands, that Mills is the real principal, and the one who ought to pay the note. The bill alleges that Post procured the orator, Flanagan, to sign the note as his surety, representing that he wanted to use it to raise money to pay the \$800 note at the Commercial Bank, on which he, Post, was surety for Mills. It appears from the testimony, that Mills applied to, and procured the orators to sign the note, and that so far as Mills, Flanagan, and Post were concerned, it was understood that the note was to be used to procure money of Butties, to pay the \$800 note to the Commercial Bank, on which Post was the sole surety for Mills. *Prima facie*, therefore, Post, by signing the note in question, would stand as surety for Mills, and co-surety with the orators. This result follows from the relation of the parties. The burden is therefore upon the orators to show some agreement on the part of Post, by which he assumed the relation of principal to the orators, or one of them at least. Without going into

details of the evidence, it is sufficient to say that we all agree that the proof does not show any agreement or mutual understanding that Post should stand as to either of the orators, as principal, or that he should indemnify either of them against the note; but, on the contrary, we find that his agreement was that he should sign the note as co-surety with the orators. Post was to take the note and sign it as co-surety, and pay the Commercial Bank note, and obtain the money of Buttles upon the note in question for his indemnity for so doing. The testimony on this point is somewhat conflicting, but taking the defendant's answer and the evidence in the case, the balance of proof is with the defendant. It appears that at that time, all the parties regarded the responsibility of Mills as doubtful, and it is with some force urged on the part of the orators, that it is not probable that the orators would have signed the note, had they supposed they were increasing their liability for Mills without any indemnity. But, on the other hand, it appears that Mills was going along with his usual business, and, as he then represented, was about entering upon a job, out of which he expected to realize something to pay upon the debts upon which the orators were already liable for him; that he had some property, sufficient to secure a considerable portion of the defendant's liability for him; that the defendant had applied to him for security, and he proposed to turn out his property to the defendant, but finally, learning that the money could be obtained of Buttles on a good note, proposed to get the orators to sign the note, as already stated, and which the defendant agreed to take. Under these circumstances, it is as probable that the orators would sign the note as co-surety with the defendant, as that the defendant would forbear to take the proffered security on the property, and take the note in question, payable in a year, agreeing to indemnify the orators against it, and thus put it out of his power to secure himself until the note should become payable. The orators may have thought it more for their interest to increase their liability to the amount of two thirds of the note, than to have the defendant secure himself on the property of Mills, and break up his business. If so, the event shows that they may not have misjudged, as Mills afterwards paid \$700 on the orator's li-

abilities, and turned out to Flanagan some of the property on which the defendant might have secured himself, and mortgaged another portion of it to Meech, to secure a note on which Adams was co-surety with Meech for Mills. This mortgage would enure to the benefit of Adams equally with Meech; as a security from the principal to one surety, enures by operation of law equally to the benefit of his co-surety. The orator, Flanagan, cannot complain of any wrongful use of the note or its avails, as it appears that before this suit was commenced, the defendant paid the Commercial Bank note, and passed the note to Butties, the payee, for its amount in money; so that that the note, with its proceeds, has been used for the purpose for which the bill alleges, and the proof shows, it was executed.

The orator, Adams, cannot say that he signed the note on the faith that the defendant was to stand as principal as to him upon the note, as the bill alleges that the note in question was executed as a substitute for the first note, and that when Mills procured Adams' signature to the first note, he represented to him that the defendant would sign it *as co-surety*; and Adams' testimony is to the same effect, although not so explicit as the allegation in the bill.

The bill alleges that Mills, when he procured Adams to sign the note, represented to him that the avails of it should be used in payment of Adams' existing liabilities for Mills. This furnishes no ground of relief, as there is no allegation in the bill, and no proof, that the defendant had any knowledge that any such representation was made; and without such knowledge, the defendant cannot be affected by it, even if the representation was made as alleged. The testimony of Adams and of Mills is in conflict on this point, and leaves it in doubt whether any such representation was made, and it is not material which is correct.

As to the allegation in the bill, that the defendant, after he received the note, offered to sell it without signing it, and refused to sign it, we do not find it sustained by proof. The alleged offer to sell the note to Bradley without signing it, appears to have been nothing more than a casual conversation in relation to giving Bradley fifty or one hundred dollars to take his place and clear him from his liability for Mills, and not an offer to sell the note

as a valid note to the full amount against the orators, unaffected by the defendant's agreement to sign it as co-surety with them. But if he did offer to sell it without signing it, and endeavor to get Buttles to take it without his signature, still, it appears that before this suit was commenced, he signed the note, and passed it to Buttles and received the consideration for it; so that the orators have not been injured by any such purpose or attempt. If the orators had such reason to apprehend that a wrongful use was about to be made of the note to their prejudice, as to warrant the bringing of the bill, they should have abandoned it when the answer came in, admitting that the defendant agreed to sign, and had signed, the note as co-surety with them, and used it in the manner the proof shows it was agreed it should be used.

The allegation in the bill, that the orators, on the 11th January, 1861, demanded of the defendant to sign the note as principal, and use it according to the understanding or agreement, or to cancel or surrender it, cannot avail the orators as a ground of relief. The defendant was not bound to sign it as principal, for that was not the agreement. He was not bound to cancel or surrender it, as he had then, out of his own funds, on the faith of it, paid the \$800 note to the Commercial Bank; not having been able to obtain the money of Buttles as soon as he expected, or as soon as Buttles had promised he should have it. It is doubtful whether, at any time after the note was delivered to the defendant, the orators could have recalled it. But if they might have recalled it immediately after it was delivered to the defendant, and before he had advanced any thing upon the faith of it, or lost any security by relying upon it, which otherwise he might have obtained, it is very clear that the defendant, having thus advanced money upon the faith of the note, and forborne to obtain other security, the rights of the parties had become fixed.

The result is, that the defendant, and the orators severally, are co-sureties upon the note in question, and bound equally to contribute to the payment of it, and that the defendant has been guilty of no such wrongful act in relation to the note, as will sustain the orator's bill. Decree of the court of chancery dismissing the bill with costs, is affirmed, and case remanded.

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Sequin v. Peterson.

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## LOUIS SEQUIN v. GEORGE M. PETERSON.

*Father and Child.*

The plaintiff's son of eleven years, purchased of the defendant, a shop-keeper, cigar-holders and fancy pipes in cases, and paid therefor \$4.75 in money. The next day the plaintiff's wife, and child's mother, went with the boy to the defendant's shop, and tendered back said articles, and demanded the money paid therefor, which the defendant refused to pay back. The plaintiff thereupon brought this suit to recover the money; and it was held, that he could recover.

Held, also, that said demand by the plaintiff's wife, if one was necessary, was sufficient. The practice of raising questions in the supreme court, which were not raised in the court below, censured by REDFIELD, J.

ASSUMPSIT for money had and received, brought to the city court of Burlington. Plea, the general issue. The court, NOYES, J., found the following facts:

The plaintiff's minor son, eleven years of age, living with his father and supported by him, without authority from his father, or any one, some time before trial, purchased of the defendant, who kept a grocery store, and sold groceries, pipes, tobacco, &c., a cigar-holder, for which he paid to the defendant one dollar and twenty-five cents, and on the same day he purchased another cigar-holder and a pipe in a case, for which he paid the defendant two dollars and fifty cents. Just before this, he purchased another pipe of the defendant, for which he paid one dollar. He also purchased some candy of the defendant, but just how much he paid for it did not appear. The whole amount paid by the boy to the defendant for cigar-holders and pipes, was four dollars and seventy-five cents. The two first purchases were made of the defendant's clerk, who testified that when the boy bought the first cigar-holder, he asked him where he got the money to buy such things, and he said that he worked for Shepherd, Davis & Co., in the lumber yard, and earned it. The defendant himself sold the boy the pipe for a dollar, and he asked the boy where he got the money, and the boy told him substantially as he did the clerk. The defendant and his clerk both testified that they never saw the boy before to their knowledge, and did not know his name at the time, or that he was the plaintiff's son. It did not appear that the plaintiff, or any of his family, had ever made any other purchases at the defendant's store. The court found that the articles so purchased were not necessities. The next day, or soon, after said purchases, the plaintiff's wife, the boy's mother, went to the

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defendant's store with the boy, and carried back said articles, and demanded of the defendant the money paid for them. But the defendant refused to pay her the money, claiming that the articles had all been used and damaged, and were not worth more than four dollars, which amount he offered to pay back. The articles were left in the defendant's store without his consent, and were there at the time of trial.

It was conceded on trial, that the defendant was not guilty of any fraud or bad faith in receiving the money for said articles, and that it was received in the usual course of business. The defendant asked the court to rule as matter of law that the plaintiff could not recover or maintain this action in his own name; but the court ruled otherwise, and rendered judgment for the plaintiff to recover four dollars and seventy-five cents damages. To the refusal to rule as requested, the defendant excepted.

*Start & Watson*, for the defendant, cited *Chit. Cont.* 673, 680, and cases cited; *Burnap v. Partridge*, 3 Vt. 144; *Babcock v. Granville*, 44 Vt. 331; *Burnham v. Holt*, 14 N. H. 367; *Mason v. Waite*, 17 Mass. 460; *Lang v. Smyth*, 7 Bing. 284; *Burnham v. Fisher*, 25 Vt. 514; *Miller v. Race*, 1 Burr. 452; *Person v. Chase*, 37 Vt. 647; *Oliver v. Houdlet*, 13 Mass. 237; *Robbins v. Fennell, et als.* 11 Q. B. 248.

*H. H. Talcott*, for the plaintiff, cited *Keen v. Sprague*, 3 Green 77; *Winn v. Sprague*, 35 Vt. 243; *Mason v. Hutchins & Co.* 32 Vt. 780; *Dickinson v. Winchester*, 4 Cush. 114.

The opinion of the court was delivered by

REDFIELD, J. The plaintiff's minor son, a child eleven years of age, purchased of the defendant cigar-holders and fancy pipes in cases, and paid him therefor, in money, \$4.75.

The next day after said purchase, the plaintiff's wife, and child's mother, went with the boy to the defendant's store, tendered back the articles so purchased, and demanded the money paid for them, which the defendant refused. The plaintiff thereupon brought this suit to recover the money thus paid for the smoking equipment furnished his child.



I. The court below adjudged, as a matter of law, that the money paid for this smoking outfit belonged to the plaintiff. There is nothing in the case to indicate that it belonged to any other person. The declaration of the boy that he "worked for Shepard, Davis & Co., and earned it," is no proof of that fact; besides, if it were so, it would not tend to show that the money was not the property of the plaintiff. As the father is bound to provide for the maintenance of his infant children, so he is entitled to their earnings and the custody of their persons. *Benson v. Remington*, 2 Mass. 113.

There is no claim that the plaintiff had allowed the son to control his own wages, or contract for himself, as in *Varney v. Young*, 11 Vt. 258; *Tillotson v. McCrillis*, Ib. 477; *Chilson v. Philips*, 1 Vt. 41. The money, then, belonged to the plaintiff, and the defendant held it without right, against the will of the plaintiff, and to *his use*.

II. The defendant claims that there was no proper demand for the money. Conceding that the contract of purchase was voidable, and that the plaintiff would be required to return the articles purchased, and demand the consideration paid, in order to *rescind* the contract, we think the tender and demand by the plaintiff's wife sufficient.

The mother will be presumed to have the more intimate and special charge of the habits and well-being of her child of such tender years, and the exercise of the parental duty of guarding the child from profligacy and dissipation. And the return of this fancy and foolish outfit for childish dissipation, and demand that the money paid for them should be returned, especially when the husband adopts the act by bringing this suit, should be presumed, in law, and in fact, to have been done with his sanction and authority. But the defendant treated her as authorized to make the demand, and offered to return the money, except a small fraction.

And inasmuch as the plaintiff, by this suit, adopts and ratifies her act, the defendant cannot be permitted, now, by pretending that he omitted to do his duty because he supposed the wife not authorized, to retain the money.

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There is another quite satisfactory answer to the defendant's claim. There were no exceptions taken to this part of the case. The defendant "asked the court to rule, as a matter of law, that the plaintiff could not recover *in his own name*, the money so paid by the minor son to the defendant." No question was made as to the sufficiency of the *demand*.

This court, sitting in error, can only try such errors as are *specified* and brought up on exceptions. The habit that has sometimes obtained, of "*dragging*" a case in this court, as for something lost, to find a fault that was undiscovered and unheeded in the trial of the cause, is ever unavailing to the client, and a deviation from professional propriety and duty. Judgment affirmed.

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STATE v. SOLOMON NORTON.\*

*Jurisdiction of Justice of the Peace. Constitutionality of the Act of Nov. 8, 1865, (Gen. Stat. 891.) Pleading. Grand Juror's Complaint.*

A justice of the peace has jurisdiction of the offense created by the act of Nov. 8, 1865, (Gen. Stat. 891), for the protection of deer.

Said act is constitutional.

The complaint alleged that the respondent "did \* \* chase, drive, worry, and kill, a live animal called a deer." *Held*, not bad for duplicity.

The objection that a memorandum of the names of the witnesses in support of the prosecution, is not subjoined to a grand juror's complaint, is in the nature of a dilatory plea, and must be made at the earliest opportunity, or it will be considered as waived.

The complaint alleged the offense to have been committed on a certain day named, which was within the period during which the statute prohibited the act. *Held*, sufficient without a distinct allegation that the offense was committed within such period.

It was held unnecessary in a complaint under said act to exclude by averment the exception in the third section of the act.

THIS was a grand juror's complaint for killing a deer contrary to the act of Nov. 8, 1865, for the protection of deer,† appealed to

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\* This case was decided at the January term, 1872.

† By which it is enacted: "Sect. 1. If any person shall hereafter, within the period of ten years, kill any animal of the deer kind, found running at large within this state, or assist therein, or shall hurt or worry any such animal, he shall be punished by a fine of fifty dollars, and costs of prosecution, to be recovered by a suit before a justice of the peace; one half of said fine to be paid to the complainant, and the other half to be paid into the treasury of the town in which such animal shall be so hurt, worried, or killed."

"Sect. 3. This act shall not be so construed as to interfere with the rights of any person who shall be the owner of such animals, partially or wholly domesticated."

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the county court. The complaint alleged that the respondent, "on the 7th day of December, A. D. 1870, at Huntington aforesaid, in the county of Chittenden aforesaid, did unlawfully, with guns, sticks, knives, and other instruments of death, chase, drive, worry, and kill a live animal called a deer, found running at large within said state, of the deer kind; contrary to the form of the statute," &c.

The case was heard on demurrer to the complaint, at the April term, 1871, PIERPOINT, Ch. J., presiding, when the demurrer was overruled, and the complaint adjudged sufficient, and the respondent fined fifty dollars. Exceptions by the respondent.

*S. H. Davis*, for the defendant.

*W. L. Burnap*, state's attorney, for the state.

The opinion of the court was delivered by

ROYCE, J. The county court, upon demurrer to the complaint in this case, held it sufficient, and the case comes here upon exceptions to that decision.

It is insisted, first, that the justice had no jurisdiction, because the offense described in the complaint being punishable by a fine of fifty dollars, the justice had no power to try the respondent.

The answer to this is, that the act of 1865, Gen. Stat. 891, which created the offense, provides that the fine may be recovered by a suit before a justice of the peace, thus expressly conferring jurisdiction upon justices of the peace; and having jurisdiction to try and determine the question of the guilt or innocence of the party accused, he had the right to render judgment against the party for the penalty which the statute imposed.

The second objection is, that the act of 1865 is in conflict with the 40th section of the state constitution, which provides that "the inhabitants of this state shall have liberty, in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed; and in like manner to fish in all boatable and other waters (not private property), under proper regulations to be hereafter made and provided by the general assembly." The rights secured

by this section of the constitution were not intended to be absolute and unconditional, but were to be governed and controlled by such proper regulations as might thereafter be made by the general assembly. The right was reserved to the general assembly to determine what were seasonable times in which to hunt and fowl, and having exercised this right, the court will not assume (certainly in the absence of proof) that it has been exercised in an unconstitutional manner. The numerous statutes which have been passed for the protection of game and fish, have been deemed necessary to the beneficial enjoyment of the constitutional right, and the court will not hold such laws unconstitutional, until it is clearly shown that they are so prohibitory as to virtually deprive the inhabitants of the right secured to them by the constitution.

The third objection is that the complaint is bad for duplicity, —that two distinct offenses are charged. But by a reference to the complaint, it will be seen that the only offense with which the respondent is charged is that he did “drive, worry, and kill a live animal called a deer.”

The fourth objection is, that a memorandum of the witnesses was not subjoined to the complaint. This objection is in the nature of a dilatory plea, and should have been made at the earliest possible time; and by proceeding to trial without making it, it must be treated as having been waived. The object of this provision was to apprise the party of the names of the witnesses who would be used to prove the facts charged in the complaint, and it is not competent for the party, after demurring to the complaint, and thus obviating the necessity for the use of any witnesses, to make this objection.

The fifth objection is, that the complaint is defective in not alleging that the act complained of was committed between Nov. 8th, 1865, and Nov. 8th, 1875. The statute upon which this complaint was made, was approved and took effect on the 8th day of Nov. 1865, and prohibited the killing of deer for the period of ten years from that date. The complaint alleges that the deer was killed by the respondent on the 7th day of December, A. D. 1870, and this we think was sufficient. That time was within the period in which the killing of deer was made unlawful by the statute.

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The sixth objection is, that the complaint is defective in not alleging the negative in the third section of the act, and that the respondent does not come within the exception. The rule of law is, that where the exception is contained in the body of the statute which creates the offense, and enters into it as a part of its description, in stating the offense it becomes necessary to negative the exception, or to allege that the party charged does not come within the exception. If the exception is distinct from the enacting clause, or from that part of the statute which creates and describes the offense (as it is in this statute), it becomes matter of defense, and it need not be negated that the respondent is within the exception. *State v. Barker*, 18 Vt. 197; *State v. Butler*, 17 Vt. 149.

The judgment of the county court that the complaint is sufficient, is affirmed. On motion of the respondent, the judgment of that court is reversed, *pro forma*, and the cause remanded, with liberty to respondent to *replead*.

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### WILLARD A. TYLER v. ROBERT SCOTT.\*

#### *Partnership.*

The plaintiff owned a tin-shop, and carried on the business in his own name. D. was a practical plumber of large experience. They made an agreement, whereby the plaintiff was to be allowed out of the profits of the business, ten per cent. on his stock invested, and the remainder of the profits were to be divided equally between them. They went on under that agreement, each devoting his whole time and attention to the business, which was carried on in the plaintiff's name as before, and D.'s share of the profits remained in the concern. *Held*, a partnership.

A partner has the right to pay his individual debt with the property of the firm, if no fraud upon the other partners is intended.

But, ordinarily, either partner should have the right to interfere, to prevent the diversion of the partnership property from the legitimate business of the partnership; but as to third persons, the intention to thus interfere should be clear beyond reasonable doubt.

**BOOK ACCOUNT.** The auditor reported that the plaintiff presented an account of \$114.66 against the defendant, which was

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\* This case was decided at the January term, 1872.

allowed, with interest; that the defendant presented an account af \$16.10 against the plaintiff, which was allowed; that the defendant also presented an account of \$85.97 against one G. B. Dow, and claimed that the same should be allowed against the plaintiff. As to said last named account, the auditor reported that Dow told the defendant some time before the commencement of said account, that he was in partnership with the plaintiff; that the said Dow contracted with the defendant to do the work and furnish the materials charged in said account, upon and for the said Dow's house, and to take his pay therefor out of the tin-shop carried on by the plaintiff as hereinafter stated, and that the defendant went on under said contract, and did the work and furnished the materials charged in said account; that the defendant then commenced trading at the plaintiff's shop, and incurred the account presented by the plaintiff, for the purpose of paying his said account against Dow, but the plaintiff knew nothing of the defendant's purpose. The auditor further reported the following facts:

In the spring of 1865, the plaintiff had a tin-shop in Burlington, and was carrying on a large business in his own name. Dow was a practical plumber of large experience, and had failed in business, and was unable to carry on business in his own name, on account of outstanding debts against him; but he desired employment at his trade, and the plaintiff wanted to secure his services, therefore they made an agreement, whereby the plaintiff was to be allowed out of the profits of said business ten per cent. on his stock invested, and the remainder of the profits were to be equally divided between them. The business went on two years, Dow and the plaintiff devoting their whole time and attention thereto, at the expiration of which time, an inventory of stock, and of accounts in favor of the plaintiff, was taken, and the amount of \$700, found to be due to Dow, was passed to his credit on the plaintiff's books. At the end of the third year, another inventory was taken, and Dow was allowed ten per cent. on the amount standing to his credit at the commencement of the year, and the amount of about \$1400, thus found to be due him, was passed to his credit as before. At the end of the fourth year, another inventory was taken, and after giving Dow ten per cent. on what was standing to his credit at the commencement of the year, and the plaintiff ten per cent. on his stock, it appeared that Dow owed the plaintiff \$400, Dow having drawn out \$1700 during the year. Dow then gave the plaintiff his note for the \$400, and left the

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concern. The stock fell considerably during the last year, which materially affected the profits. When they entered into business, nothing was said about forming a partnership, or about the name of the business, or the losses; but the business was always carried on in the plaintiff's name, and the books kept in his name, as they had been before Dow entered the concern. During the second year of the business, a claim against one Shaw was partly paid by a dividend in bankruptcy, and the balance of the claim was lost to the business, whereby the profits were somewhat diminished; but all the rest of the accounts, although some of them were considered bad, were taken by the plaintiff in each inventory, as cash.

Dow claimed before the auditor that he and the plaintiff were partners; but the plaintiff claimed otherwise, and the auditor found that the plaintiff never claimed or represented that they were partners. Dow testified before the auditor, that the relation which existed between him and the plaintiff was the same as that which had existed between him and Wheelock & Tyler, and on cross-examination testified that, in settlement with them, he gave the following receipts, viz:

“BURLINGTON, March 24th, 1865.

Rec'd of Wheelock & Tyler one hundred and four and  $\frac{66}{100}$  dollars to apply on labor since February 10th, 1865.

G. B. Dow.”

“BURLINGTON, March 24th, 1865.

Rec'd of Wheelock & Tyler forty-five and  $\frac{32}{100}$  dollars in full for labor and other demands up to February 10th, 1865.

G. B. Dow.”

The plaintiff offered said receipts in evidence, which were admitted by the auditor against the defendant's objection. Upon the foregoing facts, the auditor decided that a partnership existed between Dow and the plaintiff.

The auditor further reported, that after Dow told the defendant that he was a partner of the plaintiff, and before his contract with the defendant aforesaid, the defendant had an account of \$38 against Dow, which he asked the plaintiff to allow in payment of an account which the plaintiff then had against him for goods purchased at said shop; but the plaintiff refused to allow the account, and gave the defendant notice that he would not allow any

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account against Dow, in offset to any claim the plaintiff might have against any person in connection with said business; that no account was then talked about except said thirty-three dollar account, and that the defendant testified that he supposed the plaintiff referred to old accounts against Dow, and not to those that should be subsequently contracted; that from time to time, accounts against Dow were offset against the plaintiff's accounts, with his consent; that the defendant made the contract with Dow as aforesaid, after said conversation with the plaintiff, and gave the plaintiff no notice of said contract, until after the plaintiff and Dow had settled as aforesaid, and the plaintiff never knew of said contract until after said settlement, which was in March, 1869. The auditor further reported, that in January, 1869, after the defendant's said account against Dow had accrued, the plaintiff rendered his account (which is a part of the account herein allowed) against the defendant, amounting to over \$80, and the defendant at the same time rendered his account of \$2.59 against the plaintiff, which was then credited to the defendant on the plaintiff's books; but the defendant then said nothing about the application of his said account against Dow, and the plaintiff did not know of said account. Dow had frequently told the defendant before the rendition of said accounts, that the defendant's account against him had been allowed on the plaintiff's books, and the defendant testified that that was the reason why he then said nothing to the plaintiff about it. In the settlement between Dow and the plaintiff, the defendant's account against Dow was not taken into the account, and the plaintiff took the account against the defendant as cash, having no knowledge that there was any question about it. The auditor disallowed the defendant's said account against Dow, and found due to the plaintiff \$98.56; but submitted the question of the allowance of said account to the court, and in the event of its allowance, found due to the plaintiff \$12.59. The court, at the September term, 1871, PIERPOINT, Ch. J., presiding, rendered judgment on the report, *pro forma*, for the plaintiff to recover the smaller sum. Exceptions by the plaintiff.



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*Wales & Taft* and *Tyler & Whittemore*, for the plaintiff.

I. From the facts reported by the auditor, we insist that no partnership was, in fact, created between Dow and the plaintiff. They did not intend to create a partnership as between themselves, and, as far as they are individually concerned, their intention must govern. 3 Kent Com. 27; Story Part. 49 *et seq.* The agreement between them is as consistent with a compensated agency, as with a partnership; and being so, the intention of the parties should govern as to its character in fact. Story Part. 63, *et seq.*

II. If between themselves there was no intention to create a partnership, there is no absolute rule of law which will, nevertheless, as to third persons, make a participation in the profits conclusive that there was a partnership. If there is, it is incumbent upon the party claiming such a rule, to establish it, consistently with all the circumstances of the case. Story Part. 55. The law may *presume* a partnership from the particular character of a case; but that presumption may be repelled by the circumstances of the case itself. In this case, the facts repel such presumption. *Cottrill v. Vanduzen*, 22 Vt. 511.

There was not a partnership in the profits; that is, in the profits after deducting losses, or in the profits and losses; but only a participation in the gross profits. From all the facts in the case, it is evident that the law will not create a partnership, where the parties did not intend it, and where nothing has been done to indicate it to third persons. Story Part. 58-9, 64-5, 76; *Ambler v. Bradley*, 6 Vt. 119; *Bowman et al. v. Bailey*, 10 Vt. 170; *Kellogg v. Griswold*, 12 Vt. 291; *Chapman et al. v. Devcreaux et al.* 32 Vt. 616; *Robbins v. Willard*, 6 Pick. 464; *Loomis v. Marshall*, 12 Conn. 69.

III. The defendant's account accrued against Dow after he had notice that the plaintiff would not allow any account against Dow in offset to his claims growing out of said business. After such notice, the defendant's acts were fraudulent in law as against the plaintiff, and not binding upon him, even though the defendant supposed he had a right to make such an agreement. Collyer Part. 445; *Swan et als. v. Steele et als.* 7 East, 210.

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This case should be governed by the same principle that obtains in those cases where a person deals with one partner where the right of such partner so to deal is restricted by articles of co-partnership, as in *Hastings et als. v. Hopkinson et al.* 28 Vt. 108; *Chapman et al. v. Devereaux et al. supra.* The principle is well established, that the implied authority of one partner to bind his co-partner, may be revoked by giving notice to the party that he will not be bound. Story Part. 216; Collyer Part. 353; Gow Part. 52; *Leavitt et al. v. Peck et al.* 8 Conn. 124; *Galway v. Matthew et al.* 1 Camp. 403; *Vice v. Fleming*, 1 Y. & J. 227; *Willis v. Dyson*, 1 Stark. 164; *Munroe v. Conner et al.* 15 Me. 178; — *v. Layfield et als.* 1 Salk. 292; Story Part. 1, 228; *Dob et al. v. Halsey*, 16 Johns. 34. The cases in this state, that hold that one partner has the right to deliver goods of the firm in payment of his individual debt, are based upon the fact that the contract is one executed in good faith, with no intent of defrauding the other partner. *Fay et als. v. Green*, 1 Aik. 71; *Strong v. Fish*, 13 Vt. 277.

*Henry Ballard*, for the defendant.

I. Judgment for the smaller sum named in the report, was properly rendered. From the facts found by the auditor, Dow and the plaintiff were partners at the time the defendant's account against Dow accrued. *Brigham v. Dana*, 29 Vt. 1; Collyer Part. §§ 18, 42.

II. The defendant's account against Dow should be allowed as a part payment of the plaintiff's claim. The law is well settled in this state, that a partner has a right to make such an arrangement as Dow made with the defendant. *Fay et al. v. Green*, 1 Aik. 71; *Strong v. Fish*, 13 Vt. 277; *Eaton & Shaw v. Whitcomb*, 17 Vt. 641.

It cannot be held that the defendant acted in bad faith in respect to the partnership, as he had knowledge that Dow was a partner, and was told by Dow that his account against him had been allowed on the plaintiff's books. The bad faith, if there was any, was on the part of Dow, and the defendant should not be made to suffer for it. The other partners should suffer from

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the fraud of a co-partner, rather than innocent third persons who deal with them. Collyer Part. §§ 445-49-51-55.

The opinion of the court was delivered by

ROYCE, J. The first question presented by the report of the auditor is, whether the contract which the auditor has found was entered into between the plaintiff and Dow in 1865, and which was continued until the spring of 1869, constituted a partnership.

All that is generally required to constitute a partnership as between the parties, is, that there should be an agreement to share in the profit and loss; and even less than this may make them responsible as partners as between themselves and third parties. It is not necessary that the partners should contribute equally to the capital invested, or that the share of profit and loss should be equally proportioned.

The contract between these parties was, that after paying Tyler ten per cent. out of the profits of the business for his stock invested, the remainder of the profits were to be divided equally between them. This, it seems to us, was an agreement to share in the profit and loss of the business; for the profits to be divided would be what remained after deducting the amount of losses that had been sustained. The fact that the plaintiff and Dow were partners being established, the case falls within the rule laid down in *Fay et al. v. Green*, 1 Aik. 71\*; *Strong v. Fish*, 13 Vt. 277; and *Eaton et al. v. Whitcomb*, 17 Vt. 641†; unless it is excepted from its operation, by the notice which the auditor finds was given to the defendant by the plaintiff previous to the contract made between Dow and the defendant. Ordinarily, partners have an equal right in the management and control of the partnership affairs and its property, and it is incident to partnerships of this character, that either partner should have the right to interfere to prevent the diversion of the partnership property from the legitimate business of the partnership. But as far as parties dealing with either of the partners are concerned, the intention to thus interfere should be so expressed, and be

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\* 8. O. 2 Aik. 386.† *Gleason v. Allen et al.* 27 Vt. 364.

evidenced by such acts, as to leave no reasonable doubt upon the subject.

This right is necessary to the protection of the interests of the individual partners ; otherwise, the entire assets of the partnership might, by fraud and collusion with outside parties, be diverted from the partnership, for the benefit of a dishonest partner.

In determining how far the plaintiff could claim protection under the notice, which the auditor has found was given to the defendant, it becomes important to ascertain what claims the notice referred to. The account that the parties were talking about at the time the notice was given was then in existence, and none other was mentioned.

This notice could not be construed as applying to claims or accounts that might thereafter accrue against Dow, and, in the absence of fraud, the plaintiff could only claim protection against claims or accounts in existence at the time the notice was given.

From the facts found by the auditor, we think the defendant was entitled to the benefit of the contract made with Dow, and hence the judgment of the county court is affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF FRANKLIN,  
AT THE  
JANUARY TERM, 1873.

PRESENT :

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. JAMES BARRETT,  
HON. HOYT H. WHEELER, } ASSISTANT JUDGES.  
HON. TIMOTHY P. REDFIELD, }

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THOMAS BURNS *v.* THE FIRST NATIONAL BANK OF ST. ALBANS.

*Audita Querela. Amendment. Motion to Dismiss.*

Independently of any showing of the day on which an amendment of process is procured, it will be taken to have been on the last day of term.

The plaintiff procured an amendment of his writ on the last day of the second term. Within thirty days thereafter, the defendant filed his motion to dismiss the action for causes arising from the amendment. At the next term thereafter, the court entertained said motion, and dismissed the action. *Held*, that the entertaining of said motion was not error.

AUDITA QUERELA to set aside the judgment of a justice of the peace. The original process was substantially in the statutory form of a writ of *audita querela*, except that the prayer was, that the court reverse and set aside said judgment, "and pro-

ceed to hear, try, and determine said action according to the statute in such case made and provided," and that it was signed, "Thomas Burns by Geo. G. Smith, his Atty." Then followed a notary's certificate of the oath of said attorney, "that the foregoing complaint by him subscribed contains the truth, the whole truth, and nothing but the truth, according to his best knowledge, information, and belief." Next followed a recognizance taken before a judge of the county court, conditioned for the payment of intervening damages and costs, if the complainant should fail to prosecute his complaint to effect, or to recover in said action. Said recognizance was certified, "Allowed and signed by me at St. Albans, this 12th day of January, 1871." Then followed a supersedeas, and a citation to the adverse party to appear and answer. The case was entered at the April term, 1871, and continued, under the rules of court, to the September term, 1871, when the plaintiff, on leave of court, the defendant objecting, amended his process by striking out these concluding words thereof, "and proceed to hear, try, and determine said action according to the statute in such case made and provided." It did not appear on what day of the term said amendment was made. The case was continued to the April term, 1872, and said September term closed December 5th, 1871. On the 2d of January, 1872, the defendant filed a motion to dismiss the case, because said pretended writ was never signed by any person or officer authorized by statute to sign the same; because no person was recognized for costs of prosecution as required by statute; because the facts set forth in said writ were not verified by affidavit, as required by statute; and because said pretended writ was sought to be made such by amendment of a pretended petition for a new trial, so that the identical state of facts in the one case, could be used in the other, when such former case had been fully disposed of by the court. The court, at the April term, 1872, ROYCE, J., presiding, entertained said motion, and dismissed the case; to which the plaintiff excepted.

*Noble & Smith and Bryant Hall*, for the plaintiff.

*E. A. Soules*, for the defendant.

The opinion of the court was delivered by

BARRETT, J. The original process in this case had such "a questionable shape" when entered in court, that, at the next term, the plaintiff deemed it important to have it amended into an unquestionable writ of *audita querela*. Until that amendment was made, it could not be assumed that the judge who certified, "allowed and signed by me at St. Albans this 12th day of January, 1871," had allowed and signed a writ of *audita querela*. He had allowed and signed the original process—if the mode in which it was done can be treated as the signing of the process by the judge,—as to which we express no opinion. If that is to be treated as a signing of the writ, then, clear it is that no recognizance was taken as required by statute in case of *audita querela*. Taking the record as showing just what was done in the way of verifying the facts set forth in the writ, under § 11, ch. 42, Gen. Stat., no affidavit appears to have been made by any body; and the certificate of the judge shows that what was sworn to by Mr. Smith, is very wide of what the statute requires to be shown by affidavit. The language of the statute is, "No writ of *audita querela* shall be allowed and signed, without affidavit first made," &c. The oath that is certified, the form of the recognizance that was drawn, the concluding prayer of the original process before amendment, and the appended citation to the party to appear and answer, all concur in indicating that the plaintiff was, in his own apprehension, proceeding for a new trial. If such had proved to be true, the defendant may have been content to litigate the matter on its merits, without having occasion, perhaps not the right, to except to the form or substance of the proceeding. Thus the matter stood, till the next term after the proceeding was entered in court. Of course, the defendant was not bound to take objection to the proceeding—formal, technical, or substantial—as to a writ of *audita querela*, until the plaintiff had procured for it a fixed form and christening. This was not done till he had procured said amendment. The term closed the 5th of December. Independently of any showing of the day on which it was procured, it will be taken to have been on the last day of the term. This would leave the matter without prejudice to the defendant in respect to

the right of availing himself of dilatory matter in defense. As he could not have the four days allowed by the rules, at that term of the court, he would be entitled to his right in that respect, if asserted within time, as soon as the course of the court would give him day in which it could be done. To this intent, the defendant filed his motion within thirty days from the close of the term when the amendment was made, and, of course, that was reasonable under any rule, in order to be in time, with reference to the next term of the court.

As the plaintiff himself took the case out of the range of the rules as to the time for asserting dilatory matter in defense, we think it was the province of the county court to entertain the motion filed in this case, and the doing so cannot be held to be error. It is not claimed that the matter is not effectual in abatement, if seasonably presented. In the view we take, we find it needless to express views more definite, whether the writ can be treated as having been allowed and *signed* by the judge, or only the recognition, and as to the effect of the failure to make the affidavit as required by the statute.

We find no occasion to question or comment on any of the cases cited in the argument. *Wilder v. Stafford et al.* 30 Vt. 899, gives countenance to the disposition we make of this case. The whole thing is so unconformable to the provisions and requirements of the statute, that we think it better to let it rest under judgment of the county court, than to try to galvanize it into an existence hardly desirable to be perpetuated, even to its most interested friends.

Judgment affirmed.



## PETER W. CARLEY v. THE TOWN OF HIGHGATE.

*Soldier's Bounty. Selectmen.*

The defendant town voted to pay a bounty of \$300 to each man who had enlisted, or should enlist, into the *old* regiments, to fill the quota of the town under a given call. The plaintiff enlisted into a *new* regiment, but was actually applied on the quota named in the vote. *Held*, that he could not recover the bounty.

*Held*, also, that an *intention* on the part of the plaintiff to comply with the offer made by said vote, was not a *compliance*; and that the selectmen of the town could not make a different contract, or waive a material condition in the offer of the town.

ASSUMPSIT to recover a town bounty. Plea, the general issue, and trial by the court, April term, 1872, ROYCE, J., presiding.

The resolution set out in the opinion was passed by the town, December 17, 1863. A week or ten days before the plaintiff was mustered into service, Noah Bates, then one of the selectmen of Highgate, came to the camp of the 17th regiment at St. Albans, and there promised the plaintiff, and others, a bounty of \$300 each, if they would go on the defendant's quota, and promised the plaintiff that the bounty should be paid to him before he left the state. The plaintiff introduced testimony tending to show that he demanded said bounty before the commencement of this suit. The other facts sufficiently appear in the opinion. The court rendered judgment for the plaintiff to recover the bounty offered by said resolution. Exceptions by the defendant.

*Fitch & Newton* and *H. S. Royce*, for the defendant.

*Edson & Rand* and *H. A. Burt*, for the plaintiff.

The opinion of the court was delivered by

REDFIELD, J. This was an action of assumpsit to recover a bounty. The promise relied upon is founded upon the following resolution of the defendant town, viz. :

"Resolved that the town of Highgate raise a tax on the grand list of one dollar and twelve cents on the dollar, to be paid by the selectmen of the town of Highgate to men that may be mustered into the United States military service, in the sum of \$300 to each man that enlists, or has enlisted, in the *old regiments*, to fill the

quota of twenty men under the last call of the president for 300,000 men; or to pay them that may be drafted, said sum, who go, or procure a substitute to go in their stead."

The plaintiff enlisted and was mustered into "Company A, 17th Vt. volunteers," January 5, 1864, and was actually applied on the quota named in the resolution of the town. The 17th was a new regiment, and the vote pledged the bounty to those men "enlisted into the *old* regiments, to fill the quota."

It was competent for the town to prescribe the terms and conditions upon which the bounty should be paid. *Collins v. Burlington*, 44 Vt. 16. The party accepting the offer must comply with those conditions, if he would have the benefit of the offer. It is not for the court to determine whether *express* stipulations in a contract were deemed important or otherwise. It is the province of the court to interpret and enforce contracts as the parties have made them. Until "General Order No. 6," dated Dec. 21st, 1863, the towns had been instructed by the adjutant general that enlistments into new regiments would not count, or be applied on the quota of towns, under the call of the president for 300,000 men; and in that order the towns were distinctly notified that "there was no reasonable prospect" that enlistments into the 17th regiment could be credited on said quotas. The draft was impending, to be enforced on the 5th January next following the requisition; and the towns were urgently pressed to fill the several quotas, and thus restore to efficiency the shattered regiments in the field. It may well be conceived that motives, other than a mere dogged compliance with the requisition, to escape the draft, may have moved citizens to fill up the old regiments, and thus give succor and support "to the remnant that is left" in the decimated ranks of their brethren in the field. Such motives would have been natural, patriotic, and honorable. But we need not speculate, as the rule of law would be the same, whether the town, in making this express condition, was actuated by the one motive or the other. The town had the right to fix any condition or limitation in the offer; and the plaintiff, like any other contracting party, must bring himself within the terms of the offer, if he would have its benefits.

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 Earl & wife v. Tupper.
 

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II. It is not claimed that the conversation with Noah Bates, one of the selectmen of the town, could be held, in the light of the recent decisions of this court, a *contract*. But it is insisted that it is a sufficient notice to the plaintiff to comply with the offer. The *intention* to comply, is not a *compliance*; besides, the selectmen, if all had consented, could not make a different contract, or waive a material condition in the offer of the town. *Poquet v. North Hero*, 44 Vt. 95.

The judgment of the county court is reversed, and judgment that defendant recover its costs.

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### J. M. EARL AND WIFE v. JACKSON TUPPER.

#### *Survivorship of Action. Witness. Evidence. Damages. Pleading.*

At common law, an action in the name of husband and wife, for injuries to the wife, does not, on her decease, survive to the husband; but, by our statute, such action survives to her administrator.

What a deceased party to a suit testified on a former trial may be shown, by competent evidence, on a subsequent trial; and the attorney of such party, who took substantially correct minutes of the testimony, and, in many instances, the exact language of the party, is a competent witness for that purpose; and the minutes of the presiding judge need not be produced, or their non-production accounted for.

When it is important to show the bodily condition of a person at a certain time, what such person says to an examining physician at such time, about the then nature, symptoms, and effects of the malady then upon her, is proper evidence.

When the condition and health of a woman during some period of her pregnancy, are material to be shown, the fact that the child had spasms, or convulsions, at birth, may be weighed with other circumstances in the case bearing upon the condition of the mother after the time her condition became important, for the purpose of determining what her condition, while it was important, in fact was.

The professional opinion of a medical expert, based upon hypothetical facts, may be received in evidence before proof of any, or only a part, of the facts supposed, if the court is satisfied that the party in good faith intends to offer proof of such facts.

In an action by the administrator of the wife, for injuries to her, no damages can be recovered for any loss of the labor of the intestate that belonged to her husband.

In awarding exemplary damages, the jury must be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action. The expenses of the plaintiff for counsel fees, and other trouble in the suit, not taxable costs, are not a proper element of such damages.

An administrator, in an action for injuries to his intestate, may, in a case otherwise proper for their allowance, recover exemplary damages.

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Earl & wife v. Tupper.

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When several acts of violence to a person are committed within a short space of time, and at places a little distant from each other, and they are so connected that each, to some extent, characterises the others, and all together, they constitute a series of assaults and batteries, which may be declared for in one count, with proper allegations.

TRESPASS for assault and battery on the plaintiff, Mrs. Earl. Plea, the general issue, and trial by jury. September term, 1871, ROYCE, J., presiding.

The first count in the declaration alleged,

"That the said defendant, on the 26th day of February, A. D. 1867, with force and arms, assaulted the said Marinda Earl, then and still being the wife of the said James M. Earl, to wit, at Bakersfield aforesaid, and then and there, with a certain stick, or axe, and with his fist, hand, and elbow, gave and struck the said Marinda a great many violent blows and strokes on and about divers parts of her body; and also, then and there, with great force and violence, pushed and pulled her about; by means of which said several premises, the said Marinda was greatly hurt, bruised, wounded, and internally injured, being then and there with child, and became and was sick, sore, lame, and disordered, and confined to her bed, and has since so continued to the time of the bringing of this writ, and still is sick, sore, lame, and disordered, and confined to her bed," &c.

The plaintiff offered H. C. Adams, Esq., as a witness, to prove what Mrs. Earl testified to on a former trial of this case, she having since deceased. Mr. Adams testified that he was counsel for the plaintiffs on the former trial, and took minutes of Mrs. Earl's testimony, and intended to take them substantially correct, and supposed he did; that he could not say that he took the exact words of the witness in every particular, but in many instances had no doubt he did, and presumed he could find words, phrases, and clauses, which he should believe were the exact language of the witness. The defendant offered to show that the judge presiding at said trial took minutes of Mrs. Earl's testimony. The defendant claimed that the statute permitting parties to be witnesses, did not embrace the common law rule of reproducing the testimony of deceased witnesses; and, that at all events, the rule requiring the best evidence to be produced, would require the production of the judge's minutes; and that the exact words of the witness must be testified to. The court

allowed Mr. Adams to read his minutes ; to which, and to the admission of the testimony thus given, the defendant excepted.

It appeared, among other things, from the testimony of Mrs. Earl, as given by Mr. Adams, that, at the time of committing the acts complained of, the plaintiffs were living in a house leased of the defendant ; that on the day alleged, she went to the east barn, about sixteen to eighteen rods from their house, where she heard difficulty between the defendant and her son, and started to enter the barn, when she and the defendant had some angry talk, and he shook an axe at her, and told her to stand back ; that he came out into the barn-yard where she was, and snubbed her nose, and then smelt of his fingers ; that defendant then went into the west barn, about 70 feet distant from the other barn, and she went and stood at a stable door of the same barn, about 110 feet from the other barn, and the defendant came out at the stable door, and struck her in the stomach and knocked her down, and as she fell, her heft was thrown from her right foot to her left, and her right foot came under her and wrenched her back ; that as soon as she could, she started for the house, eight or ten rods distant, the defendant following her ; that she entered the house and closed the door, and attempted to hold it against the defendant, but could not, and, turning to leave it, the door came open and hit her between the shoulders and knocked her on to the stove ; that defendant passed her and asked her to go up stairs, but she would not, whereupon defendant struck her in her side, and went up stairs ; that he came down and asked her to go up and look at a stove-pipe hole, but she refused, and he then forbid her to build a fire in the stove, and used the same indecent language to her he did at the barn. The words of the language were given. The language was indecent, but not threatening, and there was no evidence that the defendant used any threatening language during any part of the occurrences of that day. She further testified as follows : " Before he went away he said, ' When Earl gets home, I shall come over and put you all out—the old woman into the bargain.' " In another connection she testified that, " he said if I built a fire he should be after me." She also testified that she was about seven months advanced in

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pregnancy at the time of the committing of the acts complained of; that in about an hour and a half thereafter, she was taken vomiting, and vomited blood, and had much pain in her back; that she vomited occasionally during the day; that in the morning she was in her usual good health; that in about a week she had spasms, and a difficulty commenced in her left limb and foot, which continued until her foot became contracted in the manner shown to the jury; that she had no such troubles before the injuries complained of. She further testified to having darting pains in her back and foot, and great difficulty in her spine, which continually grew worse, and that she was about forty-four years old. The defendant denied all the statements about the alleged assault and striking, and introduced the testimony of physicians who examined the body of Mrs. Earl after death, and of other persons having knowledge of the matters, tending to show that she had no such injury of her back as she testified to. All the material points in the case were disputed. The plaintiff introduced the deposition of Mrs. Fay, who testified to seeing Mrs. Earl within a few days after the affray, and examining her person; that there was a spot on her right side, swollen and inflamed, and that she complained of her right side troubling her. The witness also testified that Mrs. Earl had a child born in June of the same year, at the birth of which she was present. The deposition contained the following question, which was answered in the affirmative, to wit: "What was the condition of that child at birth; did it have spasms, or convulsions?" The defendant seasonably objected to the question and answer, but the court overruled the objection, and permitted the same to be read to the jury; to which the defendant excepted.

There was no evidence tending to show that the condition of the child at birth, in respect to spasms, or convulsions, had any tendency to show the condition of the mother, or the cause of any disease with which she was troubled. The plaintiff introduced Dr. Clark as a witness, a physician of experience, regularly graduated, who testified that he examined Mrs. Earl at the time of the former trial in October, 1869, and found her of sanguine-nervous temperament; found contraction of the muscles; one limb de-

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formed, and smaller and less sensitive than the other ; a lateral curvature of the spine ; and a little more prominent spinal processes than was natural. The witness then proceeded to relate what Mrs. Earl told him at the time of such examination, about her pains and complaints, to which the defendant objected ; but the court overruled the objection ; to which the defendant excepted.

The plaintiff then proposed to ask the witness the following question ; to which the defendant objected.

“ Suppose that you should be called to see a woman about forty years of age, whom you should find with a contraction of the foot,—the foot drawn around, with the limb in which the difficulty existed somewhat smaller than the other,—with a tenderness about the spine—the patient about six months advanced in pregnancy—that, being in her usual health, she had received a severe blow upon the stomach, from a person who used threatening language to her at the time ; that she had been thrown on to a stove with force from a door striking her between the shoulders ; that you should find that she had been struck a blow upon the groin, or upon the body ; that immediately afterwards, and within an hour or so, she commenced vomiting, and vomited blood ; that she suffered pain where this blow was struck upon her stomach and side—that she suffered pain in the small of her back—that in four or five days after, she commenced to have spasms—her limbs commenced contracting—and finally her foot became drawn around so that it was permanently contracted ; that prior to these supposed injuries, if she had never had any symptoms, or spasms, or contractions of the limb—what would you attribute the cause of these injuries to ? Further, that this supposed blow upon the stomach was of sufficient force to throw the person off her balance, and should at that time wrench that person’s back—to what would you attribute the difficulty with the limb ? ”

The court overruled the objection, and permitted the question to be put ; to which the defendant excepted. The witness answered that he “ should consider the state of things as then existing, the result of the fracas, but not definite enough to form a pathological condition—a correct diagnosis of the case.” There was no testimony tending to show any different symptoms from those above detailed. It appeared from the testimony of Dr. Clark, and from other medical experts, that fear, anger, and other

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mental conditions of the patient, had a tendency to produce the results of which Mrs. Earl complained.

The defendant requested the court to charge the jury that the occurrences at the east barn, the west barn, and the house, as shown by the testimony, were several and distinct transactions, and that the plaintiff could recover for but one of them, under the first count in the declaration. The court refused to charge as requested, but charged that the plaintiff could recover under the first count for all the alleged injuries which they found proved; to which the defendant excepted. The court further charged the jury that, if they found the loss of Mrs. Earl's limb was attributable to the injuries alleged, it was their duty to estimate what that was worth in dollars and cents as well as they could; that the loss of a limb, in a pecuniary point of view, to a sickly woman, would be less valuable than the loss of a limb to a robust woman; that if they should find her condition the result of the injuries complained of, yet, if she was in a feeble state of health before, and was liable to break down at any time, and they were going to estimate the loss to her husband in dollars and cents, they would estimate it less than they would if she was physically a healthy, robust woman, with as fair prospect of future life as other healthy, robust women; that, ordinarily, the probable duration of life was an element in arriving at the pecuniary value of the loss of a limb, but in this case, that period was determined by the death of the party at a little more than three years from the alleged injuries; that they should get at this pecuniary loss as well as they could. The court further charged that the pain and suffering endured by the party, were an element of damages. There was no qualification of the language of the charge above detailed, and the jury were not instructed what part of the pecuniary loss was recoverable in this action, and what would be properly recoverable by the husband in his separate action. On the subject of exemplary damages, the court told the jury, if they found the assault was committed in such manner and under such circumstances as to indicate malice, they were at liberty to give exemplary damages; that the object of exemplary damages was twofold; first, to compensate the party fully for his expense and



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trouble about the case, which parties always have to incur, and which are not taxable costs, such as counsel fees, &c. ; secondly, for the purpose of example, as a sort of punishment to the offending party. To the whole charge on the subject of damages, the defendant excepted. Verdict for the plaintiff.

*H. S. Royce and Benton & Irish*, for the defendant.

There was error in permitting Mr. Adams to detail the former testimony of Mrs. Earl. *Marsh v. Jones*, 21 Vt. 378 ; 1 Greenl. Ev. §165, note ; *United States v. Wood*, 3 Wash. C. C. 440 ; *Commonwealth v. Richards*, 18 Pick. 434 ; *Warren v. Nichols*, 6 Met. 261. The judge's minutes were the best evidence, and should have been produced. This principle is not contravened by any Vermont case. In *Glass v. Beach*, 5 Vt. 172, *State v. Hooker*, 17 Vt. 658, and *Marsh v. Jones*, *supra*, the testimony of the deceased witnesses was reproduced by the magistrate who presided at the former trials. In *Downer v. Rowell*, 24 Vt. 344, the testimony of one of the counsel was taken, but he was counsel for the party adverse to the one who offered his evidence, and his client could not object to his bias. In *Whitcher v. Morey*, 39 Vt. 459, the minutes of the presiding judge were produced. In *Williams v. Willard*, 23 Vt. 376, the witness gave the very words of the former witness, and, for aught that appeared, was impartial.

2. It was error to allow Dr. Clark to testify to the statements of Mrs. Earl, made at his examination. 1 Phil. Ev. 191 ; *State v. Howard*, 32 Vt. 380, 404 ; *Kent v. Lincoln*, Ib. 591, 598 ; *Aveson v. Lord Kinnaird*, 6 East, 188.

There was error in allowing the question detailed to be put to Dr. Clark. *Fairchild et al. v. Bascom et al.* 35 Vt. 398.

The first count covers only one act of assault and battery.

From the charge, the jury were bound to give the same measure of damages as if the intestate had been a *feme sole*. This was error. Loss of capacity to labor, or of the value of services, could not be recovered in this action. *Barnes v. Hard*, 11 Mass. 59.

There was error in instructing the jury that they might find exemplary damages. Such damages do not survive to the admin-

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istrator. Sedgw. on Dam. 532, n.; *Lockier, Ex'r, v. Paterson et al.* 1 C. & K. 271.

The language of the charge was an express direction to the jury to find two fold damages under the head of exemplary damages; first, to fully compensate the plaintiff for his expenses, taxable costs, and counsel fees; second, to punish the defendant, and make an example of him. Allowing taxable costs in this connection, was clearly erroneous. *Platt v. Brown*, 30 Conn. 336. It was also erroneous to include counsel fees and other expenses as an element of damages. *R. & W. R. R. Co. v. Bank of Middlebury*, 32 Vt. 639, 651; *Park v. McDaniels*, 37 Vt. 594, 598; *Harris v. Eldred*, 42 Vt. 39, 40; *Linsley v. Bushnell*, 15 Conn. 225; Judge REDFIELD's note to *Welch v. Durand*, 10 Am. L. Reg. 566; *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins et al. v. Bidulph*, 4 Bing. 160; *Grace v. Morgan*, 2 Bing. N. C. 534; *Arccambel v. Wiseman*, 3 Dall. 306; *Stimson v. Railroads*, 1 Wall. Jr. 164; *Good v. Meylin*, 8 Barr. 57; *Barnard v. Poor*, 21 Pick.; *Lincoln v. S. S. & R. R. Co.* 23 Wend. 435; *St. Peter's Church v. Beach*, 26 Conn. 355; *Fairbanks v. Witter*, 18 Wis. 287; *Day v. Woodworth*, 13 Howard, 363; *Teese v. Huntington*, 23 Ib. 2.

*Davis & Adams*, for the plaintiff.

Upon the first point, we cite *Marsh v. Jones*, 21 Vt. 378; *Whitcher v. Morey*, 39 Vt. 459.

The question in Mrs. Fay's deposition was proper.

The declarations of Mrs. Earl to Dr. Clark, were properly admitted. *Kent v. Lincoln*, 32 Vt. 591.

The hypothetical question propounded to Dr. Clark, was proper. It comes within the rule laid down in *Fairchild et al. v. Bascom et al.* 35 Vt. 398.

The assault, as detailed in the evidence, was essentially one occurrence and one transaction. *Hodge v. Bennington*, 43 Vt. 450. But if not, the objection came too late. The plaintiff should have been put to elect upon which he would proceed. *Hodge v. Bennington*, *supra*. All the transactions were admissible in aggravation of damages. Chit. Pl. 428.

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The charge upon the measure of damages, was correct. Sedgw. Dam. 528-532; *Devins v. Rand*, 38 Vt. 621.

The opinion of the court was delivered by

WHEELER, J. I. At common law, this action would not survive to a husband, nor to an administrator. At the decease of the female plaintiff, all the rights of the person claiming to be her husband, whether he was in fact her husband or not, came to an end. By the force of the statute, the action survived to her administrator, and after he appeared and entered into the suit, to prosecute it, he, as administrator, was the sole plaintiff. As she had died, and the administrator had entered to prosecute before the trial in the county court, that trial was solely of his right as administrator to recover of the defendant. This right of recovery did not rest at all upon any marital relation between her and the person set up as her husband, but would be fully made out by showing that the defendant was guilty of the doing to the intestate of the wrong sued for, and that the plaintiff was her administrator. Therefore, the question as to the effect of the divorce and the validity of the subsequent marriage, was of no importance in the case.

II. The presiding judge at the former trial was not required by law to take any minutes of the testimony of the witnesses. Whatever minutes he did take, were taken solely at his own pleasure, for his own convenience and guidance; and, when taken, they did not constitute an official record of the testimony. Such minutes were not record proof of the testimony, and were not of a higher grade of legal quality than minutes taken by other persons, as evidence, according to the rule of law requiring the best evidence to be produced, and it was not necessary to either produce them, or account for not producing them, before other evidence of the testimony of a deceased witness could be received.

Although the witness that had died was a party to the suit when she testified, she was a competent witness at the time she testified, and would have been competent to prove the same facts at this trial if she had been living, and it was proper that lawful evidence of her former testimony should be received. *Perry v.*

*Whitney*, 30 Vt. 390. The witness offered to prove her testimony, testified that he took minutes of it with substantial accuracy, and that he thought he had taken the exact words in many instances, although not in every particular, and he produced these minutes in connection with his testimony. This seems to be sufficient, according to the decision in *Whitcher v. Morey*, 39 Vt. 459. The reasons for that decision, as set forth in the opinion by STEELE, J., are clear and satisfactory, and there is no occasion for repeating them here. A similar decision has been made since that case, but it has not yet been reported.

III. The evidence on the part of the plaintiff appears to have tended to show that the injury done by the defendant to the intestate was permanent, and that she was suffering from it at the time of the former trial, when she was examined by a physician. The defendant seems to have insisted to the contrary of this. Her bodily condition at that time was important in the trial. What she said at that time as to the nature, symptoms, and effects of the malady she was then suffering from, was proper evidence. 1 Greenl. Ev. §102. The defendant appears to have objected to the testimony of the physician as to what she then told him of her complaints and pains. What the witness testified that she did tell him of her complaints and pains, is not stated: The subjects of which she told him, were such as made testimony as to what she told him, proper, so long as it did not go beyond her bodily condition at that time, and, as it does not appear to have gone beyond that, no error in overruling the objection appears.

IV. The condition and health of a mother have great influence and effect upon her child during pregnancy, to and after the birth of the child. The condition and health of the intestate during the latter part of the time of her pregnancy, was important, and the fact that the child had spasms, or convulsions, at the time of its birth, if such was the fact, was a circumstance proper to be weighed with the other circumstances in the case bearing upon the condition of the mother after the time when that became important, for the purpose of determining what her condition, while it was important, in fact was; and there was no error in

allowing the question as to the condition of the child to be put and answered.

V. The only proper use of the evidence obtained by the question put upon the facts supposed to the medical expert, was to show to the jury what, in the professional opinion of the expert, caused the injury to the limb of the intestate, if the facts supposed to exist actually did exist. The actual existence of the facts was to be shown at some time during the trial by some means other than this question. The order of putting in the evidence was subject to the control of the court in its discretion, and the evidence of professional opinion upon facts supposed, might, if the court was satisfied that it was offered in good faith, expecting it would be followed by proof of the facts supposed, be admitted as well before the proof of the facts as after; or might be received after evidence of part of the facts, and before that of the rest. If, after the evidence was all in, there was a lack of evidence of the existence of any material part of the facts supposed, the jury should be instructed to lay the evidence of the opinion out of their consideration. The point made as to this evidence is upon its admissibility, and not upon the disposition afterwards made of it. Whether the case shows evidence of facts sufficient to warrant the court in leaving the existence of them to the jury, with the evidence of the opinion based upon them or not, is a question that has not been examined into by this court. The exceptions show no error in law in the admission of the question and answer.

VI. It is true, as claimed by counsel for the defendant, that no damages could properly be recovered in this action for any loss of the labor of the intestate that belonged to her husband. If the court had been requested to instruct the jury to that effect, and had declined to do so, otherwise than by the charge as given, perhaps there would have been error. But the charge as given did not direct the jury to find any damages on account of such loss of labor; nor, as to this part of the case, on account of any thing besides the personal injury to the intestate herself. The comments of the court upon the measure of such damages as

affected by the previous condition, as to health, of the intestate, and by her age, appear to have been just and proper, and no error appears in the charge as given in this respect.

VII. Except in the particular just treated of, the charge of the court as to actual damages appears to have been satisfactory. But after charging fully in respect to actual damages, the court appears to have further charged that if the jury found the assault was committed in the manner and under circumstances indicating malice, they were at liberty to give exemplary damages. That the object of exemplary damages was twofold; to compensate the party fully for his expenses and trouble he had been to about the case, that parties always have to incur, not taxable costs, but counsel fees, &c., and for the purpose of example, as a sort of punishment for the party who offends, and that if they came to the question of damages, and believed that the actual damages were not sufficient, and not as much as justice required between the parties, then they were at liberty, under the instructions, to give such exemplary damages, as they thought the case might require at their hands; and to this the defendant excepted. To what extent a plaintiff has a right to have the jury go in awarding damages where insult, indignity, and wounded honor and sensibilities, are a direct consequence of the injury recovered for, is not in question and necessary to be determined here; but the question is as to the right of the parties in respect to exemplary damages beyond just compensation for the injury recovered for. The doctrines as to such damages, appear to have grown up out of the refusals of courts to grant new trials on account of excessive damages, in cases where the verdicts were greatly in excess of any possible pecuniary loss, but the injury recovered for was attended with malice, oppression, gross fraud, or negligence. In such cases, such motions were usually overruled, unless it appeared that the jury were influenced by passion or prejudice, on the ground that the jury might, in their discretion under such circumstances, visit the defendant with greater damages against him, to show with what detestation they viewed such conduct as they found him guilty of, and to administer wholesome correction for it by way

of example. Afterwards it came to be the practice of courts to instruct the jury that they were at liberty to enhance the damages in such cases for those purposes. This was instructing the jury beforehand how far they might go without exposing their verdicts to be set aside. This is now the settled practice in this, and most of the other states. There are a few cases, and among these, some relating to patents, where the liability of defendants has been increased on account of their conduct in resisting the liability whereby the expenses of plaintiffs in obtaining remedy were increased. These patent cases are said to rest somewhat upon the peculiar provisions of the statutes, and the others have not been generally followed.

The great weight of authority seems to be opposed to the allowance of counsel fees, and other expenses of litigation, beyond taxable costs, as an element of damages, even in cases proper for exemplary damages. At least, there is so much authority that way, that this court is at liberty to disregard those the other way, if necessary in order to follow the rule most in accordance with legal principles and sound reason. In this state, and in most, and, probably, all the others, the legislature has taken cognizance of the propriety and justice of allowing costs to some extent in favor of the winning against the losing party. In this state, provision is made for attorneys' fees, and there is no distinction in law here between attorneys and counsel; and, although the provision made is probably very small in comparison with the actual expense in most cases, it is as much as the law-making power has seen fit to make it, and courts and juries have no power to allow more, any more than they would have if it was large enough to cover all such actual expenses. The power over this subject rests entirely with the legislature, and that has not made any provision for allowing actual expenses as damages in any case, although it has made some distinction as to costs in cases arising from the willful and malicious acts of defendants. A party in an action upon contract may be as malicious, and may put the other party to as much expense, as in an action of tort for an act that was malicious, and no good reason is apparent why these expenses should not be considered as much in one of these cases

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as the other. The true rule seems to be, that the plaintiff is entitled, as a matter of right, to recover compensatory damages for the injury done him by the act recovered for, with his legal costs, and that the jury, in cases proper for exemplary damages, are to be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action, in awarding them.

The charge in this case left the jury at liberty to consider the expenses of the suit to the plaintiff for counsel fees and trouble, not taxable costs, and to allow these expenses to the plaintiff as a part of the exemplary damages, if they saw fit. This is considered to have been erroneous.

The counsel of the defendant insist that because the injured party had died, and the suit was prosecuted by an administrator, it was not, under those circumstances, a proper case for exemplary damages. If such damages were given as a compensation to the person injured, for some remote consequence of the injury, for which damages could not be given otherwise than as exemplary damages, there might be some reason for this view. But, as has been stated before, such damages are given to stamp the condemnation of the jury upon the acts of the defendant on account of the malicious or oppressive character of the acts, and the decease of the party injured, would not take away the bad character of the acts, nor prevent the jury from holding them in detestation, nor take away their right to visit the defendant with damages, to show what might be expected from similar conduct.

VIII. The several acts of violence which the testimony tended to show that the defendant did to the intestate at each of the barns, and at the house, were so connected together that each of them would, to some extent, characterize the others; and all together, if the testimony was true, made a continuous series of assaults and batteries, which might be included in one count of a declaration, with proper allegations. *Devine v. Rand*, 38 Vt. 621; *Hodge v. Bennington*, 43 Vt. 450. The first count in the declaration in this case, contains allegations sufficient to cover all these transactions, and seems to be well adapted to the case shown by the evidence. Judgment reversed and cause remanded.



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JOHN HOADLEY v. S. B. WATSON.

*Exemplary Damages.*

The imposition of a fine in a criminal proceeding for assault and battery, will not bar or mitigate the party's liability to exemplary damages in a civil suit for the same act. Such damages are recoverable with the ordinary damages, under the common allegation that the act declared for was done to the damage of the plaintiff.

The expenses of the plaintiff for counsel fees, and other trouble in the suit not taxable costs, are not a proper element of exemplary damages. *Earl et al. v. Tupper, ante, 275.*

TRESPASS for assault and battery.\* Plea, the general issue, and trial by jury, April term, 1872, ROYCE, J., presiding.

The defendant offered in evidence, for the purpose of mitigating damages, and upon the question of exemplary damages, the record of a judgment against himself in a criminal prosecution for the assault set forth in the declaration, and offered to show that the prosecution was instituted at the plaintiff's request, and upon his complaint. The court excluded said record and the testimony offered in connection therewith, and the defendant excepted.

The plaintiff offered no testimony to show what expense he had incurred by way of counsel fees, or otherwise, in the prosecution of this suit, which was not taxable costs.

The defendant requested the court to charge the jury as follows :

1. "If the jury finds that the defendant assaulted the plaintiff, the plaintiff is entitled to recover only individual or personal damages, and is not entitled to recover damages assessed as a punishment for the damage done to the public.

2. "That damages are given to the plaintiff as a compensation, recompense, or satisfaction to him for an injury actually received by him from the defendant. They should be precisely commensurate with the injury—nothing more—nothing less.

3. "That the evidence tends to show that the personal injuries complained of, constituted acts for which the plaintiff was

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\* In a plea of trespass, for that the said Spursey Watson, on the 5th day of November, A. D. 1870, at St. Albans aforesaid, with force and arms, in and upon the plaintiff made an assault, and him the said plaintiff then and there beat, bruised, kicked, wounded, and evil treated; and other enormities to the said plaintiff then and there did, against the peace, and to the damage of the plaintiff, as he says, two hundred dollars.

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liable in a criminal action, and that, under this state of facts, the plaintiff is not entitled to recover exemplary damages."

The court declined to charge as requested, but charged upon the question of exemplary damages as follows :

"If you find that the assault was wanton in its character, and unprovoked, you are at liberty to give what the law denominates exemplary, or punitive damages, and whether you will give them or not, is a matter entirely within your discretion. Where the act is not wanton in its character, and where it appears to be innocent in intent, the jury are not, as a general rule, to give exemplary damages. The object of exemplary damages is twofold in its character. One object is to remunerate the party for the expense he is put to in the assertion of his right, which is not taxable costs. Another object is for the sake of example to others—as a sort of punishment to the party, and to act as a sort of restraint upon others from committing similar acts."

To the refusal to charge as requested, and to the charge as detailed, the defendant excepted.

*A. G. Safford*, for the defendant.

If the charge was correct, the exclusion of the record was error. The charge states one object of exemplary damages to be "for the sake of example to others—as a sort of punishment to the party, and to act as a sort of restraint upon others from committing similar acts." This was the object of the criminal prosecution, and the record is conclusive that the defendant has been sufficiently punished, and sufficiently made an example of. That the liability to criminal prosecution is a bar to exemplary damages, see *Jacks v. Bell*, 3 C. & P. 316; *Tabor v. Huston*, 5 Ind. 322; *Southwick v. Ward*, 7 Jones (N. C.), 64; *Austin v. Wilson*, 4 Cush. 273; *Taylor v. Carpenter*, 2 Woodb. & M. 122; *Thorley v. Kerry*, 4 Taunt. 335; — v. *Johnson*, 1 B. Mon. 80; *Cherry v. McCall*, 23 Ga. 193. The contrary is held in New York, California, Connecticut, Ohio, and Michigan.

The charge in relation to expenses beyond taxable costs, was erroneous. There is no allegation in the declaration, which warrants such damages, and no evidence that any such expenses had been incurred. Besides, expenses beyond taxable costs cannot

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be considered by the jury in assessing exemplary damages. *Barnard v. Poor*, 21 Pick. 278; *Sinclair v. Elder*, 4 Taunt. 7; *Hathaway v. Barrow et als.* 1 Camp. 151; *Jenkins v. Biddulph*, 4 Bing. 160; 1 Chit. Pl. 372, 442; *Dean v. Dean's Estate*, 43 Vt. 337, 345; *Haverstick v. Erie Gas Co.* 29 Penn. 254; *Hicks v. Foster*, 13 Barb. 663; *Willet v. N. E. R. R.* 12 S. C. 290; *Fairbanks v. Witters*, 18 Wis. 287; 7 Blackf. 277; *Arcamble v. Weisman*, 3 Dall. S. C. 306; *Day v. Woodworth*, 13 Howard, 363; *Lese v. Huntington et al.* 23 Ib. 2.

It was also error to charge that exemplary damages are for the sake of example and punishment.

It was error to charge, "that when the act is not wanton in its character, and when it appears to be innocent in intent, the jury are not, as a *general rule*, to give exemplary damages." The charge should have been positive, that in such cases the jury were not to give these damages. Sedgw. Dam. 454; 22 Vt. 238.

From the nature of the pleadings, the plaintiff was not entitled to recover exemplary damages, and the defendant was entitled to the requests made. The declaration is for a simple assault, and contains no averment of malice, wantonness, or matter of aggravation. Sedgw. Dam. 38; Hilliard Rem. for Torts, 404, 440; 2 Greenl. Ev. 254; 1 Chit. Pl. 271, 440, 441; *Merrills v. Manf'g Co.* 10 Conn. 384; *Nivin v. Stevens*, 5 Harring. (Del.) 272; 21 Howard, 221; 4 Gray, 333; 14 Wend. 159; 1 Saund. 242.

*Davis & Adams*, for the plaintiff.

The doctrine of exemplary damages is fully recognized in this state. *Devine v. Rand*, 38 Vt. 621; *Ellsworth v. Potter et als.* 41 Vt. 685. Its effect is sought to be avoided in the case at bar by showing that the defendant has been convicted for the same assault in a criminal proceeding. This evidence was properly excluded. *Cook v. Ellis*, 6 Hill, 466; Sedgw. Dam. 462, 530 (n).

There was no error in the charge as to the twofold object of exemplary damages. *Goddard v. G. T. R. R. Co.* 10 Am. Law Reg. 17, and note; *Welch v. Durand*, Ib. 566, and note; *St. Peter's Church v. Beech*, 26 Conn. 355; *Day v. Woodworth et al.*

13 Howard, 363; *Hopkins v. At. & St. L. R. R.* 36 N. H. 9; *Taylor v. G. T. R. R. Co.* 48 N. H. 304; *Bartlett v. Wood & Tr.* 32 Vt. 372.

The opinion of the court was delivered by

WHEELER, J. 1. Exemplary damages are not given in lieu of punishment. The fact that in a civil action founded on a criminal act, the guilty party had been compelled to pay exemplary damages to the party injured on account of the act, would be no bar to a prosecution in a criminal proceeding for the same act, nor to any part of the fine imposed by law upon such offenses. Neither should the liability to, nor the actual imposition of, a fine in a criminal proceeding, bar any portion of the liability in a civil action for the same act. This was the doctrine announced by the very able court in *Cook v. Ellis*, 6 Hill, 466, and approved in *Sedgwick on Damages*, 462. The liability to both criminal punishment and to such damages as a jury may impose in a civil suit, is the consequence of any act that is criminal, and also creates a civil liability.

2. Exemplary damages grow entirely out of the nature of the act of the defendant for which the plaintiff recovers. They are given in enhancement, merely, of the ordinary damages, on account of the bad spirit and wrong intention of the defendant manifested by the act, and are recoverable with the ordinary damages, under the common allegation that the act declared for was done to the damage of the plaintiff.

3. The charge in this case in respect to the object of exemplary damages, is similar to that in *Earl & wife v. Tupper*, heard at the same term with this case, and is considered to be erroneous for the same reasons, and for that error the judgment must be reversed.

Judgment reversed and cause remanded.

## MISSISQUOI BANK v. J. T. &amp; J. EVARTS.

*Evidence. Books of Entry. Province of the Court in Charging the Jury.*

When on cross-examination, the reliableness of a witness's testimony is forced to depend mainly on what appears upon books of entry kept by the witness in relation to a certain business transacted by him, and out of which the matter in controversy arose, and as to his mode of doing which he had testified in chief without objection, it is legitimate for the other party to show fully the manner in which such business was transacted, and how such books were kept, as corroborative of the testimony of the witness; and such books are evidence for the same purpose.

It is the province of the court to instruct the jury as to the true light in which, under the law, the materials of evidence are to be considered and used; and, when some question arises on the subject, the court may lawfully state to the jury their impressions and understanding of how a witness meant to be understood, and indicate how such impressions and understanding were derived; especially when the court tell the jury that it is all a matter of fact for them to determine upon the testimony.

ASSUMPSIT on a promissory note for \$290, payable to the plaintiff. Plea, payment, and trial by jury, April term, 1872, REDFIELD, J., presiding.

At the time the note in suit was executed, Homer E. Hubbell kept a deposit of money at Fairfax, and discounted notes for the plaintiff, and discounted this note. The note was eighteen months overdue when the defendants were called upon to pay it.

The defendant, James Evarts, testified that on the day the note became due, or a day or two before, he paid it to said Hubbell in the street near said Hubbell's house, in Fairfax; that Hubbell then said the note was at the bank, it being his practice to send all notes discounted by him to the bank, and that when he sent the money to the bank, the note would be sent back to him, and that witness could have it by calling for it. The said defendant's son testified that he was present and saw the money paid as aforesaid.

The plaintiff introduced said Hubbell as a witness, who testified to the manner of his doing business for the plaintiff. It appeared that when he discounted a note, it was sent to the bank, at Sheldon, where it remained until the money was paid thereon, when he sent the money to the bank, and the note was returned to him for the maker; that when money was thus paid to him, he

gave no receipt therefor, but practiced entering on a cash-book all money by him paid out on notes discounted, and all money received in payment of notes ; that on his cash-book there was an entry of the money paid to the defendants at the time the note in suit was discounted, but no entry of any money received in payment thereof. He also testified that the said James Evarts never paid said note to him. On cross-examination he testified that he depended in the main upon his cash-book for his recollection as to the non-payment of the note ; that he did not know but the note had been paid to the bank, but that when inquired of at the bank, he was sure it had not been paid to him ; that he remembered thinking at the time the note was discounted, that the defendants were new customers, and would probably pay it

The plaintiff then offered to show by said Hubbell the manner in which he transacted the business of the bank, and how he kept his cash-book ; to which the defendants objected. The court overruled the objection, and the defendants excepted. The said Hubbell then testified how he conducted the business, and how he kept his cash-book, and how and when he made his settlements thereon, and stated that he made a settlement every night, when he had time, and every Saturday night, to see if there had been any error. The plaintiff offered said cash-book in evidence in support of Hubbell's testimony, and it was admitted by the court ; to which the defendants excepted. The plaintiff also introduced as a witness a girl who lived with the said James Evarts, and who was with him at the time he claimed to have paid the note, who testified that they did not stop, nor pay money to any man, to her knowledge.

The court charged the jury as follows :

" The witness, Hubbell, in support of his testimony, produces his books of entry ; he tells you of the manner of keeping those books ; of the weekly settlement of his cash-account ; that he has kept those books, and done business for the bank, some dozen years, or more ; and the whole manner of doing the business has been explained to you, and the books will be before you. The weight of the witness's testimony is all for the jury, both as to the person and manner, and the clearness and intelligence on the one side, or the want of it on the other. The degree of confidence

and faith you have in the integrity and certainty of the witness, the manner, measure, and weight of it, are all for the jury.

"Counsel have claimed that the court should instruct the jury as to the weight of that book. I am not aware of any fixed legal rule as to the weight which a book of contemporaneous entry bears. It depends, as all triers know, upon the accuracy and character of the same. Thus, in a book of accounts where there are alternate entries from time to time of accounts against different persons, it would not be so easy to go into a false charge, as when they are kept item after item, one after another, against the same person. A witness's entries or memorandum made at the time, are always admissible in corroboration; because, if a witness is honest, and made a memorandum at the time, it has a great deal of force as against his misrecollection; but, undoubtedly, as is urged to you, you will find the chief weight of the book in the fact, if you find it from inspection, that Hubbell was in the habit of periodically, and within a few days—within a week of each other—balancing his books and counting his cash. Counsel for the plaintiff urge to you, from the manner of keeping this, like a cashier's account in a bank, that when he balances, it is utterly impossible, unless he makes an entry of a false item, to balance his accounts, if he has money on hand that he cannot account for; or, if there is a balance against him at the end of the week, he must know it. Whether that be absolutely so, is a matter for you. But it is apparent, if those books were honestly balanced, and found to balance the week this note is claimed to have been paid, except as to \$20, which he minuted as an error in exchange of money with Dee, it would be pretty probable that if he had \$290 he would have discovered it. Counsel argue to you that it would have been impossible for him not to have known it, and that you cannot explain it, except upon the theory that Hubbell was in a position intentionally to purloin those funds at the time. You will examine the manner of the entries, the times he settled with himself, and from the testimony, his manner of entry at the time, if he did so, and in connection with his testimony, you will give just that measure of weight to the evidence, which, from your experience, you think it entitled to receive; the court have no intimations as to its weight."

To the charge of the court in regard to said book, the defendants excepted.

After the jury retired, being unable to agree, they returned into court, and inquired whether Hubbell kept his bank money separate from his private cash. The reporter then read disputed

portions of the testimony to the court ; and the court said to the jury :

“ In regard to the testimony of Hubbell, and the manner of keeping his account, whether the book refers solely to the bank money, or all the money he received, from the book itself and from his general statement, the impression was made upon the court that he spoke of all his money. You will notice when he balanced his book the Saturday after the defendant claims he paid him \$290, he found an error of \$20, and entered it upon his book as a supposed error in exchange with Dee. From that, and other entries, I infer he made an entry of all his money, and then counted it up and saw whether his book balanced. That is the way he became aware he had \$20 surplus that week. In looking over his entries, he says he was satisfied that it must have occurred in exchanging money with Dee. Although that exchange was not entered on the book at all, being an even exchange, he found he had \$20 in money that did not belong to the bank, but belonged to some one other than himself ; and he made it right.”

The court then remarked at length upon the importance of the jury's agreeing, and then said :

“ As I understand it from the book and the general bearing of the testimony, Hubbell meant to give us to understand that all the money which he received was entered upon the book, and that he counted it up to see what the balance should be in his hands. I do not think he distinctly stated that ; but, from his general statement and explanation of the book, it appeared to me that he meant to say that. Counsel have reminded me that he did not distinctly testify whether the book contained entries of all cash received and disbursed. It is a mere suggestion, and should not control you in any way. If you think, from the book and from his general testimony, that he kept them separate, that he entered on the book merely bank money, and that that was his habit, it is a matter for you. It does not occur to me how he could enter the item of \$20, as it had nothing to do with the bank, unless it was his practice to enter on this book other than bank money. He found in counting his money that he had \$20 that certainly did not belong to the bank, and he held it on account of a supposed error with Dee ; and my impression is there are other instances indicating that. It is all a matter of fact for you to determine upon the testimony.”

To which instructions, the defendants excepted. Verdict for the plaintiff.



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*M. Buck* and *H. S. Royce*, for the defendants.

The objection to showing by Hubbell the manner in which he transacted the business of the bank, and how he kept his cash-book, was well taken. The testimony had no tendency to prove the issue.

The admission of Hubbell's cash-book in support of his testimony, was error, there being no entry upon it pertinent to the issue—not even any memorandum to refresh his memory. *Mattocks v. Lyman et al.* 18 Vt. 98; *Morse v. Patten*, 4 Gray, 292. If the book was properly admitted, the charge was calculated to mislead the jury, by treating it as if there were entries upon it material to the issue.

What the court said in answer to the inquiry of the jury when they came into court disagreed, was not warranted by the testimony.

*Edson & Rand*, for the plaintiff.

It was legitimate for Hubbell to explain the manner in which he transacted business with the bank, and how he kept his cash-book. *Downer v. Rowell*, 24 Vt. 343. The cash-book, in connection with Hubbell's testimony, was properly admitted. *Soules et al. v. Burton*, 36 Vt. 652; Greenl. Ev. § 436; *Merrill v. I. & O. R. R. Co.* 16 Wend. 586; *Lapham v. Kelley*, 35 Vt. 195.

The charge as detailed in the exceptions, was correct, and such as the case called for. *Austin v. Bingham et al.* 31 Vt. 577; *Sawyer v. Phaley*, 33 Vt. 69.

The opinion of the court was drawn up by

BARRETT, J. Mr. Hubbell as a witness, without objection, had testified to the manner of his conducting the business of loaning money and receiving payment of such loans for the plaintiff bank; from which it appeared that he was accustomed to enter on a cash-book the money paid out by him when a note was discounted, and also the money when received by him in payment of a note on which book was entered the money paid to defendant when the note was discounted, but there was no entry of the payment of money on the note. In addition to this, he testified that defend-

ant did not pay the money due on the note, as defendant had testified that he did. Thereupon, on cross-examination, the manner of the questions, and the answers of the witness, made the impression that his denial of the alleged payment by the defendant, resulted mainly from the fact that said book contained no entry of such payment. In this conjuncture, obviously, it was made by such cross-examination, both important and legitimate to show fully the manner in which the business was done—in the doing of which, and as part of it, was the keeping and making entries in the book; not that the book by itself would constitute affirmative evidence of the non-payment of the money, but it would, in connection with the mode of keeping it, as a part of the *modus operandi* of doing the business, bear upon the reliableness and effect of the testimony of the witness, in his denial that defendant had paid the money at the time alleged and testified by defendant.

If, by the cross-examination, the reliableness of his testimony had not been forced to depend on the book showing what had taken place in relation to the payment of the money by defendant as he had testified, it would have been unimportant to go into that detail of testimony to which objection was made, and also to have given the book in evidence. But when such a questionable condition of the witness's testimony was made by the defendant to depend on the entries and manner of doing the business of the bank, in connection with the book, certainly, upon common principles, the book, and its minute history, should be laid before the jury, to enable them to determine the value of the testimony of the witness, in denying that the payment was made as the defendant had testified. This is consonant with both text-books and decided cases.

We are unable to discover any thing improper in the remarks of the judge to the jury. It seems to us that in those remarks the true province was assigned to that book, viz: as bearing on the reliableness of Hubbell's testimony in denying the payment by the defendant. It is the weight of witness's testimony, that the court was presenting for the consideration of the jury, as touching the issue on trial: the court expressly declining even to advise them as to the weight of evidence afforded by the book

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in its subordinate and ancillary character. The comments of the judge, giving some intimations to the jury how the book has significance as evidence at all, are both sensible and proper, and such as would naturally occur to the mind of one experienced in the principles of evidence, and in the just apprehension of the instruments of evidence and their legitimate use. The idea that it is the duty of the court to leave the jury to such light as may be shed upon them by counsel in the argument of cases, without intimations as to the true light in which, under the law, the materials of evidence are to be considered and used, not only is not proper to be countenanced, but is counter to the practice of the best class of judges. In the present case the jury were left free, not only to construe, but to weigh and apply, the evidence, and find the questionable facts from it. It would be a noticeable innovation if it should now be held that the court could not lawfully state to the jury his impressions and understanding as to how a witness meant to be understood in the testimony he had given, when some question had arisen on that subject, and indicate how such impression and understanding were derived—especially when the court close by telling the jury that, “it is all a matter of fact for you to determine upon examination of the testimony.”

We regard the criticisms in the argument on this ground of exception as not warranted by principle or usage, and without adequate occasion in the present instance.

Judgment is affirmed.

## JAMES MORSE v. EDGAR J. POWERS.

*Agency.*

The plaintiff's son conducted the business of a small store belonging to the plaintiff, under an agreement that he should have a support for himself and family out of it, as a compensation for his services. Both took goods from the store as they wanted for family use, and no account was made of them. While the son was thus in the store, the defendant doctored his wife, and took goods out of the store in payment for his services, which were necessary, by agreement with the son, who had no means of support except what he derived from the store as aforesaid. When he left his father's employ, he credited the defendant's services on the store-books; but the plaintiff erased the credit, and brought this suit to recover for the goods thus delivered to the defendant; and it was *held*, that he could not recover.

**BOOK ACCOUNT.** The only question in the case was as to the allowance of the defendant's account for doctoring the wife of the plaintiff's son; as to which the auditor reported the following facts:

The plaintiff's son, James Morse, Jr., was engaged in conducting and attending to the business of a small store belonging to the plaintiff, under an agreement that he should attend to the business, and have a support for himself and family out of it; and the plaintiff had said that his son was to have half the profits of the business; but no inventory was taken of the stock on hand when the son went into the store; nor was any account kept to show what the plaintiff or his son took out of the store. Each took goods from the store as they wanted for family use; but the auditor did not find that a partnership existed between them. While the son was thus engaged in the store, the defendant, a physician, was called to visit his wife, and on his first visit, went into the store, and it was then and there agreed between the defendant and the son that the defendant should take his pay for doctoring out of the store. The defendant continued to doctor the son's wife nearly a year under said arrangement, and charged his services therefor to the son; during which time he received the goods from the plaintiff's store, which were charged to him in the plaintiff's account allowed by the auditor. Most of said goods were delivered to the defendant by the son, and the charges therefor made by him. Two or three days after the son left the store, he credited the defendant the amount of his services on the plaintiff's books. But the plaintiff refused to let the credit stand, and erased it. The plaintiff knew that the defendant

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was attending upon his son's wife, and that his son had no means of paying him for his services, except what he was receiving for attending to the business of the store; and knew that the defendant began taking goods from the store about the time he commenced doctoring his son's wife, and that the goods were charged to the defendant upon the plaintiff's books. When the defendant was making his third or fourth visit, the plaintiff met him in the road, and had a talk with him about doctoring her, and said his son had paid out a good deal of money for doctoring her, and that still another bill was to be made for the same purpose, which would have to come out of him, but that he did not care about the bill, if it did the woman any good. The auditor found no express agreement by the plaintiff to pay the defendant's said bill; but found that the defendant relied upon the assent of the plaintiff to the arrangement made between the defendant and the plaintiff's son, and that said reliance was based upon the plaintiff's knowledge aforesaid, and upon the conversation between the plaintiff and defendant above mentioned. The plaintiff's son had to depend upon his labor and interest in said store, such as it was, for the support of his family. The defendant's charges were reasonable, and his services necessary.

If the defendant's said account was to be allowed, the auditor found due to the defendant the sum of \$49.36. If not, he found \$99.23 due to the plaintiff.

The court, at the April term, 1872, ROYCE, J., presiding, rendered judgment on the report for the plaintiff. Exceptions by the defendant.

*H. A. Burt and B. Hall*, for the defendant.

*Fitch & Newton*, for the plaintiff, cited *Denison v. Tyson*, 17 Vt. 549, 555; *Squires et al. v. Barber*, 37 Vt. 558; Chit. Cont. 819; 1 Am. Lead. Cas. 556, 574; *Smith v. Watson*, 14 Vt. 332; *Carter v. Howard*, 39 Vt. 106.

The opinion of the court was delivered by

REDFIELD, J. This action is book account. The auditor's report states that the plaintiff's son, James Morse, Jr., had charge and conducted the business of the plaintiff's store of goods, in Franklin, near Canada line. That there was no special agreement as to compensation for the son's services. But it was

"agreed that James, the son, should attend to the business of the store, and should have a support for himself and family out of the business." Both the plaintiff and the son took goods as they wanted, from the store, for family use, and no charges were made or account kept of them. The auditor further reports that the goods were delivered by James, Jr., in payment of defendant's services as physician in attending upon the son's wife, and were delivered from time to time, as the services accrued; and when James, Jr. left his father's service, he cancelled the account, by crediting on the books the defendant's account for these professional services. The auditor finds defendant's services necessary.

There is no doubt that the agreement at the time the goods were delivered to the defendant, that they were received in payment of defendant's services, was binding, as between the parties to the contract. The only question would seem to be whether James Morse, Jr. was authorized to deliver the goods in payment of his own debts.

The plaintiff agreed that the son should have "*support* for himself and family, from the business"; and he was in the habit of appropriating the goods for that purpose. Proper medical treatment to the sick, is deemed, by usage, as necessary as the provision of bread to the hungry. And, we think, the facts reported authorized the son to clothe and feed his family from the avails of the store, and, by the same means, procure "*necessary*" medical attendance to those of them that were sick.

II. The auditor finds that the defendant *relied on the plaintiff's assent* to the arrangement made between James, Jr. and the defendant. The report does not state that the plaintiff expressly *assented* to the arrangement, but that defendant's reliance was *based* on certain specific facts reported. And it seems that plaintiff was aware that the son was delivering goods to the defendant, while the services were being rendered; that he knew James had no other means with which to pay for those services, and that he told the defendant that "his bill would have to come out of him, but he did not care about the bill if it did the woman any good." When the auditor states that the defendant *relied* on the plaintiff's *assent*, "*based*" on these facts, the natural

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construction of the language used would be, that the plaintiff expressly assented to the arrangement. They were certainly very satisfactory proof of such assent. But however this may be, we are satisfied that the agency of James, Jr., authorized him to make the arrangement with the defendant. The judgment of the county court is therefore reversed, and judgment on the report that the defendant recover of the plaintiff forty-nine dollars and thirty-six cents, and interest from the 24th of April, 1872.



JAMES ROONEY, GUARDIAN OF WILLIAM H. RYAN, v. SAMUEL H. SOULE.

[IN CHANCERY.]

*Jurisdiction of Chancery to Remove a Cloud to the Title of Land.*

The orator alleged in his bill that R., his ward, was the owner of a farm in F., and had a homestead therein, and that he was adjudged a bankrupt, and the defendant appointed his assignee, and that said homestead was decreed to R. by the court of bankruptcy; that R. absconded, and the orator was appointed his guardian; that the defendant thereafter obtained judgment by default against R., before a justice of the peace, without the service of process, notice, or recognizance for review, and levied his execution upon, and set off, said homestead; that it was the duty of the orator, as such guardian, to sell said homestead for the support of R.'s family, but that said levy and set off hindered and impeded his selling the same, and constituted a cloud upon the title thereof; and prayed that said cloud be removed. The answer averred that the court of bankruptcy adjudged that R. had a homestead interest in said farm; that the defendant's claim upon which said judgment was founded, was anterior to the acquisition of said homestead, and that said homestead was not exempt from said levy and set-off. The case was heard on bill and answer. *Held*, that the case was not one for the interposition of a court of equity.

APPEAL from the court of chancery. The case sufficiently appears from the opinion, except that the bill alleged that it was necessary for the orator, in the due performance of his duty as guardian, to sell his ward's said homestead interest for the support of the family of his said ward, and that the levy and set off on the defendant's execution, and the record thereof in the town-clerk's office, constituted a cloud upon the title of said homestead,

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and greatly hindered and impeded the orator in selling the same. The court, ROYCE, Chancellor, dismissed the bill. Appeal by the orator.

*Bent n & Irish*, for the orator.

A question is made that there is no ground for application to a court of chancery. This is to be determined by the bill without regard to the answer. The bill presents several grounds of equity jurisdiction. It claims that the judgment was irregularly obtained. It is true, this would have been ground for *audita querela*, which is a statutory remedy, like the special petition for a new trial on the ground of fraud, accident, or mistake. But it has been held that such remedies are cumulative, and do not extinguish the remedies previously existing. *Alexander v. Abbott*, 21 Vt. 476. In the early history of equity jurisprudence, and before the day of the writ of *audita querela*, such irregularities were a well recognized and very common ground of equity jurisdiction. But, be this as it may, the case shows other and very clear grounds of equity jurisdiction. The bill shows that the orator, as guardian, is obliged to sell this property for the support of the children of his ward, and that he cannot make the sale with this levy outstanding. This levy, then, constitutes a cloud upon the orator's title, which works him an injury. On this ground, he has a well recognized ground of relief in chancery to remove that cloud. *Hodges v. Griggs et al.* 21 Vt. 280, 282; *Eldridge v. Smith et al.* 24 Vt. 484; *Hilliard Injunct.* 304, 550; *England v. Lewis*, 25 Cal. 357. Another ground might be, to prevent multiplicity of suits.

*F. M. McIntyre*, for the defendant.

The orator asks to have this court vacate and set aside the judgment of a court of law having jurisdiction of the parties and the subject-matter, the property being levied upon by execution issued upon such judgment,—which, in accordance with the repeated decisions of this court, cannot be done. *Briggs et al. v. Shaw et al.* 15 Vt. 78; *Smith v. Pettengail*, Ib. 82; *Devereaux v. Cooper*, Ib. 88; *Barrett v. Sargent*, 18 Vt. 365; *Bradley et als. v. Richardson*



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*et al.* 23 Vt. 720; *Warner v. Conant*, 24 Vt. 351; *Shedd v. Bank of Brattleboro*, 32 Vt. 709. The judgment of another court upon the same subject-matter, having jurisdiction, is conclusive as to that matter. *Low v. Mussey*, 41 Vt. 393. The case shows that if the orator is entitled to any redress, he has an ample remedy in a court of law; and in such case, a court of chancery will not interpose. *Barrett v. Sargent*, *supra*. If there was, or is, any irregularity about the defendant's judgment against Ryan, *audita querela* is the proper remedy. *Hurlbut v. Mayo*, 1 D. Chip. 387; *Marvin v. Wilkins*, 1 Aik. 107; *Alexander v. Abbott*, 21 Vt. 476; *Whitney et al. v. Silver*, 22 Vt. 634; *Hopkins v. Hayward*, 34 Vt. 474. If a defendant have no notice of the pendency of a suit, and judgment be rendered against him by default, the judgment is not irregular nor void, as by writ of review he can have his day in court according to the provisions of the statute. Gen. Stat., ch. 31, § 52, *et seq.*; *Davis v. Beebe*, 5 Vt. 560; *Ellsworth v. Learned*, 21 Vt. 535; *Marvin v. Wilkins*, *supra*. The orator does not show in his bill any matter that would constitute a defense to the defendant's suit at law, which is absolutely necessary to entitle him to any relief in a court of chancery against the judgment. *Fletcher v. Warren*, 18 Vt. 45; *Warner v. Conant*, *supra*. The facts set forth in the answer, constitute a full defense to the suit; and the orator having set the case down for hearing on bill and answer, the truth of the answer is conceded. *Doolittle v. Gookin*, 10 Vt. 265; *Slason v. Wright*, 14 Vt. 208; *Gates v. Adams et als.* 24 Vt. 70.

The opinion of the court was delivered by

REDFIELD, J. The orator alleges in his bill that his ward, William H. Ryan, was the owner of a farm in Fairfield, and had a homestead interest therein; that he was adjudged a bankrupt by the district court of the United States for Vermont; that the defendant was duly appointed assignee of his assets, and that a homestead was decreed to said Ryan by said court; that Ryan absconded, and that the orator was appointed his guardian; after which the defendant obtained judgment without service of process, or notice, or recognizance for review, before a justice of the

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peace, against said Ryan, and levied his execution and set off said homestead. The answer avers that the district court adjudged that Ryan had a *homestead interest* in said premises; that the defendant's claim, upon which he obtained said judgment, was anterior to the acquisition of said homestead; that said homestead was not exempt from his execution and levy, and that his judgment was regular and valid. The case was submitted on bill and answer.

I. This is a bill *quia timet*, to remove a *cloud* from plaintiff's title to a parcel of land. Another cloud, somewhat dense, seems now to have enveloped the title, by a decree of foreclosure which has become absolute against both parties. And as this is averred and relied upon in the answer, it should operate, at least, as a *disclaimer* of title on the part of the defendant. It is doubtful, upon the averments in the bill and answer, whether Ryan had an absolute and entire homestead. Homesteads, under our statute, may exist *sub modo*, subject to certain debts, or mortgage liens. Whether it is not the province and duty of the bankrupt court to marshal the assets of the bankrupt, and determine priorities of right and lien, or what *has* been done as to this property by that court, is not made very clear in proof or argument. But we think this not a case for the interposition of a court of equity.

There is no fund locked up awaiting the determination of title, as in *Hodges v. Griggs*, 21 Vt. 280, and the court, in that case, directed the parties to implead at law. There is no averment that makes this an exception to the common case where one party claims to be the true owner of land, and alleges that another claims it without valid title. The jurisdiction of courts of law and of equity is not concurrent in this class of cases, leaving a party his *election* in which forum he will have his rights determined. But courts of equity will, in their *discretion*, in *exceptional cases*, interpose to prevent fraud and wrong. Where one holds the apparent title, but it is invalid in the hands of those who have notice of the equities of another, and there is reason to apprehend he will convey it to an innocent purchaser, a court of equity will interfere to restrain a party from such threatened act; for otherwise it would work a fraud to an innocent party. But

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when the title asserted is all of *record*, and its infirmities can be exposed at all times, and against all persons, a court of equity will not interfere, but leave the party to his remedy at law—the forum provided for settling such issues of fact. Such is the general current of the authorities. *Van Doren v. Mayor of New York*, 9 Paige, 388; *Mallory v. Dougherty*, 16 Wis. 267; *Munson v. Munson*, 28 Conn. 582; 1 Story's Eq. Juris. § 700 a, and note; *Woodman v. Salstonstall*, 7 Cush. 181; *Blackmore v. Von Fleet*, 11 Mich. 252.

In *Wing, Adm'r, v. Hall & Darling*, 44 Vt. 118, WHEELER, J., says: "The relief in such cases is granted, not as a matter of right that the party seeking it has, but as a matter of *discretion* that the court may or may not exercise, as appears fit." That discretion is not arbitrary, but *judicial*, and is to be exercised in exceptional cases where the remedy at law is inadequate, and delay dangerous; or some other ingredient is shown requiring the effectual powers of equity jurisdiction to prevent fraud and injustice. If the defendant's judgment, execution, and levy, are void, their infirmity is apparent upon the records, which are fixed, and will remain; and when the defendant attempts to oust the orator by asserting the validity of his judgment and set off, there would seem little danger, and the orator could readily show their invalidity.

But if a party who distrusts his own title and fears that of another, may, at his election, and as an experiment, drag into a court of equity all persons who may have some claim or title to the premises, and thus occupy the court in canvassing titles and determining rights that were never asserted, it would be perverting a very salutary rule of equity law to needless and mischievous ends. The inquiry into title to lands, has a special fitness to trial by jury; and we think that litigation would be abridged, and public justice subserved, by adhering to a just and salutary rule of law, rather than perverting it to new experiments.

The decree of the court of chancery dismissing the orator's bill, is affirmed, and the cause is remanded.

## STATE v. THOMAS PATTERSON.

*Dying Declarations. Burden of Proof. Right of Court to Communicate with Jury out of open Court, and while considering of their Verdict. The sense in which a man's House is his Castle.*

It is not necessary in order to make dying declarations admissible in evidence, that the declarant should state everything constituting the *res gestæ* of the subject of his statement; but only that his statement of any given fact should be a full expression of all that he intended to say as concerning his meaning as to such fact.

The fact that a witness, by whom dying declarations are sought to be proved, reduced the declarations to writing at the time they were made, but has lost the memorandum, does not bear upon the question of their admissibility, but only upon the reliability of the recollection of the witness.

On trial of an indictment for manslaughter, the court charged the jury that, "if they were convinced beyond a reasonable doubt that the death of the decedent was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment \* \* \*. That all killing is presumed to be unlawful; and when the fact of the killing is established, it devolves on the party who committed the act to excuse that killing—to show that it was justified—in order to escape the legal consequences which attach to the commission of the act." *Held*, error; and that exculpatory evidence having been given on trial, the jury should have been instructed, in substance, that, upon all the evidence, they must find beyond a reasonable doubt that the crime charged in the indictment was committed by the respondent, in order to warrant his being found guilty.

It is error for the court to have any communication with the jury after a case has been submitted to them, and while they have it under consideration, except in open court.

It is also error for the court to furnish the jury a copy of the statutes of the state while they are out of court deliberating upon their verdict, that they may read certain provisions, designated by the court, touching the case under consideration.

The case of *State v. Hooker*, 17 Vt. 670, commented upon and explained.

The idea embraced in the expression, that *a man's house is his castle*, is, not that it is his property, and that, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity, is, that it is sacred for the protection of his person, and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle, in order to reach the inmate. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in, by any means rendered necessary by the exigency—and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

Where the defense can legitimately claim that there was an assault on the respondent's house, with the intent, either of taking his life, or of doing to him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under the circumstances at

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tending the emergency, the respondent had reason to believe, and was warranted in believing, and in fact did believe, that it was necessary in order to prevent the commission of such crime.

In case the purpose of an assailant is to take life, or inflict great bodily harm, and the object of his attack upon a house is to get access to the occupant for such purpose, the same means may lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case, the point of justification is, that such use of fatal means was necessary in order to the rightful, effectual protection of the respondent, or his family, from the threatened or impending peril.

INDICTMENT for manslaughter. Plea, the general issue, and trial by jury, April term, 1872, ROYCE, J., presiding.

On trial, the evidence tended to show that on the 24th of May, 1871, the respondent was living with his wife, mother and sisters, in a tenement house in the village of St. Albans; that on the evening of that day, George W. Flanders, the decedent, and one Watson, being under the influence of liquor, went to the respondent's house, after he and his family had retired for the night, and, knocking at the door, asked to be let in; that the respondent raised the window of his room and told them that he did not want any one there, and that they could not come in; that they said they wanted to come in and talk with the respondent, and kept insisting upon being let in, and remained some time, insisting, and grew more violent the longer they stayed, and repeatedly threatened to break the door down, and swore, and used abusive language, and threw a brick or stone through the window; that one of them took off his hat and commenced taking off his coat, and started towards the door, whereupon the respondent went into another room and got a gun that he had used some days before, hunting, and which was loaded with shot, and put the barrel on the window sill and fired, giving the said Flanders a mortal wound, of which he died. The respondent testified that he fired to the ground, and that his object was, not to hit them, but to scare them away.

The prosecution introduced Morrill J. Hill as a witness to prove the dying declarations of the decedent, who testified that he saw him after he was shot; that in answer to his inquiries he made statements concerning the occurrence connected with the shooting; that he was so weak that the witness could not get a

full or detailed statement of the affair from him, and got only detached statements in the intervals between the spells of vomiting; that he took the words of the decedent on paper at the time, to preserve his dying declarations, but that the paper was lost; that the statements were made by the decedent in the consciousness that he was in a dying condition. To the admission of this testimony the respondent objected, but the same was admitted; to which the respondent excepted.

The respondent requested the court to charge that "the making of an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle." But the court refused so to charge; to which the respondent excepted. The court charged the jury that, "if they were convinced beyond a reasonable doubt that the death of Flanders was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment \* \* \*. That all killing of a human being is presumed to be unlawful; and when the fact of the killing is established, it devolves on the party who committed the act to excuse that killing—to show that it was justifiable—in order to escape the legal consequences which attach to the commission of the act"; to which the respondent excepted.

After the jury had retired to consider of their verdict, they sent the following inquiry in writing to the court, by the officer having them in charge: "What is the law in relation to manslaughter in the third degree, or what is the punishment for manslaughter in the third degree?" and the presiding judge, while the court was in session and the jury in their room for deliberation, without the knowledge of the respondent or his counsel, or the counsel for the state, sent to the jury in their room, and without their coming into open court, the following communication in writing: "There are no degrees in manslaughter under our laws; but the amount and kinds of punishment that shall be inflicted you will see are, with certain limitations, in the discretion of the court"; and the court sent the General Statutes to the jury in their room, and referred them to § 15, ch. 112. To which, after the verdict of guilty had been returned,

and as soon as the fact came to their knowledge, the counsel for the respondent excepted.

*Farrington & McIntyre* and *Benton & Irish*, for the respondent.

Mr. Hill's testimony to the dying declarations of Flanders was improperly admitted. From his testimony it appears that he could not get a complete statement from Flanders, but only fragments. This is not sufficient. 1 Greenl. Ev. § 159.

The charge of the court as to the burden of proof, was erroneous. "The burden of proof never shifts, but is upon the government throughout." Redfield's note, 1 Greenl. Ev. § 81 b; *Commonwealth v. McKie*, 1 Gray, 61. "It is the duty of the court, first, to pronounce the criminal innocent until he is proved guilty; and secondly, after he is shown to have committed a homicide, to look for every excuse which may reduce the guilt to the lowest point consistent with the facts proved." *State v. McDonnell*, 32 Vt. 491, 538. Whether this rule is sufficiently comprehensive to embrace cases of what may be termed extraneous justification, as the question of sanity, it is not necessary to inquire here; but to the extent this case goes, namely, the circumstances attending the act and constituting the *res gestæ*, it is not now controverted. 1 Whart. Crim. Law, § 708, note; 3 Greenl. Ev. § 149, note; *Commonwealth v. Hawkins*, 3 Gray, 465.

The court refused to give any practical effect to the doctrine that a man's house is his castle. The respondent was entitled to a charge in that respect in accordance with his request. 2 Bishop Crim. Law (3d ed.), § 653, and note; *Pond v. People*, 8 Mich. 150, 177; *Commonwealth v. Drew*, 4 Mass. 396; 2 Whart Crim. Law, § 1024; *State v. Hooker*, 17 Vt. 658, 670; Whart. Homi. 233.

The court erred in holding any communication with the jury in their room while they were considering upon their verdict. If at all, the jury should have been called into open court, and the communication there made, in the presence of the counsel and respondent. Hilliard New Trials, ch. 10, §§ 35, 36, 37, and note A; Ib. ch. 11, §§ 156, 157; 3 Whart. Crim. Law, § 3136-39; *Sargeant v. Roberts*, 1 Pick. 339; *Merrill v. Nary*, 10 Allen, 416; *Burrows v. Unwin*, 3 C. & P. 310; *Taylor v. Bettsford*,

13 Johns. 487 ; *Hoberg v. State*, 3 Minn. 262. It was also error for the court to allow a copy of the statutes to be taken to the jury in their room. *Merrill v. Nary*, *supra* ; *Newkirk v. State*, 27 Ind. 1 ; *Burrows v. Unwin*, *supra*. In all cases, parties have a right to a trial in accordance with the established rules of practice of courts, and, *a fortiori*, in cases where the life or liberty of the party is at stake, is he entitled to such a trial that the verdict shall be above suspicion. It should be beyond all doubt. *State v. Prescott*, 7 N. H. 287 ; *People v. Douglass*, 4 Cow. 26. Even in civil cases this rule is adhered to strictly. *Brant v. Fowler*, 7 Cow. 562 ; *Taylor v. Betsford*, *supra*. A new trial will be granted when the communication is directly calculated to influence the minds of jurors, although, in point of fact, the verdict was not influenced. *McDaniels v. McDaniels*, 40 Vt. 363, 374 ; *Brant v. Fowler*, *supra* ; *Taylor v. Betsford*, *supra* ; *Madden v. State*, 1 Kan. 340. In the case at bar, it is fair to presume that the jury would not have made the inquiry they did, if, at the time, they had agreed upon a verdict. The fact of making the inquiry raises the presumption that the communication influenced their verdict, and it devolves upon the state to show that it did not. *McDaniels v. McDaniels*, *supra* ; Hilliard New Trials, ch. 3, § 18 ; *Ib.* ch. 7, §§ 1, 2 ; *Ib.* ch. 10, § 51.

*George A. Ballard* and *W. D. Wilson*, for the state.

The testimony of Hill was properly admitted, the court having first become satisfied that the declarations were made by the decedent in the belief and consciousness that he was at the time in a dying condition. *Roscoe Crim. Ev.* 22-3-4 ; *U. S. Crim. Dig.* 151-174 ; *State v. Howard*, 32 Vt. 380, 404 ; *State v. Center et al.* 35 Vt. 378.

The charge of the court was correct, and presented the defense in every legal light that the testimony had any tendency to put it. The request to charge is subject to the objection that it does not contain sound law to the full extent. *Vaughan v. Porter*, 16 Vt. 266 ; *Roscoe Crim. Ev.* 464, 581-2, 638-9, 643 ; 2 Bishop *Crim. Law*, §§ 627, 630, 632, 641, 643, 727, 729,



The grounds relied on for a new trial are insufficient to justify this court, in the exercise of a sound discretion, in setting aside the verdict. The same rule obtains in criminal, as in civil cases. Hilliard New Trials, 113-14. It is not only incumbent on the petitioner to show some irregularity in the proceedings of the court, or misconduct of the jury, but, also, that such irregularity and misconduct tended to influence the verdict, and prejudice his rights. The acts complained of could not, by any reasonable intendment, have had any influence upon the jury in determining the guilt or innocence of the respondent. *State v. Czmp*, 23 Vt. 551; *Peacham v. Carter*, 21 Vt. 515; *Downer v. Baxter*, 30 Vt. 467; *Denison et als. v. Powers*, 35 Vt. 39; *McDaniels v. McDaniels*, 40 Vt. 363; *Vaughan v. Porter*, *supra*; *State v. Bryant*, 21 Vt. 479; 12 Pick. 518; Hilliard New Trials, 224.

The opinion of the court was delivered by

BARRETT, J. It is objected in behalf of the respondent that the dying declarations of Flanders, as testified by Mr. Hill, should have been excluded from the consideration of the jury, by force of the rule as stated 1 Greenl. Ev. § 159, viz., that "whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with, and qualified by, other statements which he is prevented by any cause from making, they will not be received." What we understand by the expression, that the statement "must be complete in itself," is, not that the declarant must state every thing that constituted the *res gestæ* of the subject of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact. This is plainly indicated by the closing part of the above quotation, as to the declarations made being intended by the dying man to be connected with, and *qualified* by, other statements which he is prevented from making. There is no indication in the testimony given by Mr. Hill, that Flanders intended what he said to Hill should be qualified by any thing that he wished to say, and was prevented from saying, or did not say. The fact that Mr. Hill had lost the paper containing the declarations in

writing, does not bear on the question. It may have some bearing as to the weight which ought to be accorded to the evidence thus given, as depending on the accuracy of his recollection and his correctness in repeating from memory what Flanders said to him. But this, in that respect, is only the common case of comparative reliableness, as between the statement of facts orally from memory, and the statement of them in written memoranda made at the time the facts occurred.

The fact that Flanders made his statement in intervals between vomitings, does not touch the question of the competency of the evidence, unless it should appear that by such vomitings, he was prevented from expressing his meaning in relation to the facts that he was undertaking to state. By recurring to the testimony of Mr. Hill, given in full in the reporter's minutes, it will be seen that the facts are few and simple, about which the dying man undertook to speak ; and there is nothing in their nature that would seem to require any thing more to have been said in order to get the meaning that he intended to convey in respect to them. The manner and circumstances of the making of the dying declarations are proper for consideration, in giving effect to them as evidence in the case, much the same as if the deposition of the dying man had been taken, and given in evidence on the trial.

II. The court charged the jury that if they were convinced beyond a reasonable doubt that the death of Flanders was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment \* \* \* that all killing is presumed to be unlawful ; and when the fact of the killing is established, it devolves on the party who committed the act, to excuse that killing—to show that it was justified—in order to escape the legal consequences which attach to the commission of the act." In this we think there is error. As to the rule of presumption, as affecting the burden of proof, as it is ordinarily found in the books on criminal law, especially the older ones, it suffices to refer to the remarks of Ch. J. REDFIELD, in *State v. McDonnell*, 32 Vt. 538-9. Yet, with reference to that rule, as it was applied to the present case, the statement of it in *Foster*, 256, is worthy of notice. "In every charge of

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murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, *unless they arise out of the evidence adduced against him*, for the law presumeth the fact to have been founded in malice, until the contrary appeareth." In Roscoe Crim. Ev. 20, that quotation is preceded by this statement, viz.: "When a man commits an unlawful act, *unaccompanied by any circumstances justifying its commission*, it is a presumption of law that he acted advisedly, and with an intent to produce the consequences which have ensued."

In *York's* case, 9 Met. 91, the meaning of the rule is peculiarly indicated by the manner in which Ch. J. SHAW stated it: "That where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious, and an act of murder." That meaning is made palpable and is illustrated by the same great judge in *Hawkins's* case, 3 Gray, 465, in which he says, "that this was inapplicable to this (*Hawkins's*) case, where the circumstances attending the homicide were fully shown by the evidence." And on this point he instructed the jury that "the murder charged must be proved; the burden of proof is on the commonwealth to prove the case; all the evidence on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter."

In *McKie's* case, 1 Gray 61, on an indictment for assault and battery with a dangerous weapon, the subject of the burden of proof in that class of offenses was fully considered by the court, and instructively discussed by BIGELOW, J., in the opinion of the court drawn up by him. He says: "It appears that the justification on which the defendant relied was disclosed, partly by the testimony introduced by the government, and in part by evidence offered by the defendant; and that it related to and grew out of the transaction or *res gestæ* which constituted the alleged crim-

inal act." The result is stated thus: "But in cases like the present, \* \* \* where the defendant sets up no separate independent fact in answer to the criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." Preceding this extract, it is said, "Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offense alone, it is conceded that the burden is not shifted by proof of a voluntary killing, where there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide"; citing *York's case*, *supra*, and *Webster's case*, 5 Cush. 305.

We adopt the views thus shown, in their application to the present case, so far as to hold that, with reference to the state of the evidence given on the trial, the jury should not have been instructed as they were in the parts of the charge above recited, but should have been instructed, in substance, that upon all the evidence, they must find beyond a reasonable doubt that the crime charged in the indictment was committed by the respondent, in order to warrant his being found guilty,—with proper adaptations of the instruction to this feature of the case, as presented in the course and manner of the trial.

III. The exception to the communication of the presiding judge with the jury, and sending to them a copy of the statutes, with a reference to a particular section, is maintained. The prevailing idea in this state has been that all communications between judge and jury, after a case has been submitted to the jury and while they have it in consideration, should be in open court, and, so far as we know, the practice has been conformable to this idea.

In 1 Pick. 242, *Sargent v. Roberts et al.*, Ch. J. PARKER says: "We are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and jury after the cause has been committed to them by

the charge of the judge, unless in open court, and, when practicable, in presence of the counsel in the cause." See *Taylor v. Betsford*, 13 Johns. 487.

As to furnishing the jury with a copy of the statutes, we regard the rule to be equally distinct and decisive, not only in this state, but elsewhere. 3 C. & P. 310, *Burrows v. Unwin*. In *Merrill v. Nary*, 10 Allen, 416, a copy of the statutes was carried to the jury at their request, and with the consent of the judge. This was held to be improper; and the proper views applicable to the subject are so amply set forth in the opinion delivered by Ch. J. BIGELOW, as to render it needless to do more than refer to that opinion.

In other respects, we deem the charge to be conformable to the established principles of the law as promulgated in the text-books and treatises, and applied and illustrated in the decided cases. From what is made known to us by the bill of exceptions as to the evidence given and the facts proved in the trial, we fail to discover in the charge ground or occasion for such a character and spirit of criticism as was exhibited in the argument before this court. On the other hand, I am commissioned to express the full conviction of each member of this court, that the utmost fairness towards the respondent, and great painstaking that he should suffer no abatement from the legitimate force of his defense, were exercised by the presiding judge.

From experience at the bar and on the bench, we very fully understand that many things in the features and details of a charge to the jury are prompted by, and are addressed to, peculiar features and details of the argument that has preceded. From the requests and points of exception stated in the record before us, together with the arguments which we have here heard, the present case seems not to be exceptional in that respect. If we had before us the arguments addressed to the jury, with the same verbal fullness that we have the charge of the court, it seems quite presumable that we should find reason to admire, if not to be surprised at, the self-poise with which the presiding judge bore himself in the charge, as against operating prejudice to the respondent.

It is not deemed needful for the purposes of this case, with reference to its future prosecution, to discuss specifically any other subject, except that of the dwelling-house being one's castle, as bearing upon his right to kill or to use deadly weapons in defense of it. This is presented in the 3d request in behalf of the respondent, which is, in the language used by HOLROYD, J., in charging the jury in *Meade's case*, *infra*, viz.: "The making of an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." The purpose of this request seems to have been, to justify the killing with the gun, as a lawful mode and means of defending the *castle*, as well as the person within it. Looking to the state of the evidence, it is not altogether obvious what there was in the case to warrant its being claimed that the respondent killed Flanders as a means of defending himself or his castle. It was claimed in behalf of the prosecution, and the evidence given in that behalf showed, that the gun was not fired at Flanders as a measure of force, to repel and prevent him from breaking into the house. Moreover, in the exceptions it is said, "The respondent testified that he fired to the ground, and the object in firing was, not to hit them, but to scare them away." The respondent seems not to have regarded it a case, or a conjuncture, in which it was needful or expedient to use a deadly weapon as a means of forceful resistance to meet and repel an assault on his house—whatever such assault in fact was—or to protect himself from any threatened or feared assault on his person. The gun, loaded with powder alone, would have served all the needs of the occasion, and of the exigency which the respondent supposed then to exist and to press upon him.

Nevertheless, the point was made by said 3d request. It was indicated in the charge that the case, *State v. Hooker*, 17 Vt. 670, was invoked in support of it, and it is cited in this court for the same purpose. That case professes to decide only the question involved in and presented by it, viz., whether it was criminal under the statute for the respondent to resist an officer in the service of civil process within his dwelling-house, such officer having unlawfully broken into the house for the purpose of making such

service. The language of the opinion is to be interpreted with reference to the case and the question. That case in no respect involved the subject of the use of a deadly weapon with fatal effect in defense of the castle; and it is not to be supposed that the judge who drew up the opinion was undertaking to discuss or propound the law of that subject.

*III* To come, then, to the subject as it is involved in this case under said 3d request. In Foster's Crown Law, 319, it is said, "The books say that a man's house is his castle for safety and repose to himself and family." In *Cook's* case, Cro. Car. 537, an officer, with a *capias ad satisfaciendum*, went with other officers, for the purpose of executing the same, to the dwelling-house of the respondent, and, finding him within, demanded of him to open the door and suffer them to enter. He commanded them to depart, telling them they should not enter. Thereupon, they broke a window, and afterwards went to the door of the house and offered to force it open, and broke one of the hinges; whereupon Cook discharged his musket at the deceased and hit him, and he died of the wound. "After argument at the bar, all the justices, *seriatim*, delivered their opinions, that it was not murder, but manslaughter; the bailiff was slain in doing an unlawful act in seeking to break open the house to execute process for a subject, and every one is to defend his own house. Yet they all held it was manslaughter; for he might have resisted him without killing him; and when he saw and shot voluntarily at him, it was manslaughter."

That was one of the earliest cases, and was fully considered; and it has been cited in all the books on criminal law since its decision in 1640 (15th Car. I.),—with some incorrectness of statement, in 1 Hale P. C. 458, and in other books adopting Hale's text. This is in some measure rectified by a remark, 1 East P. C. 321-322. See, also, Roscoe Cr. Ev. 758; also 1 Bishop Cr. L. § 858, n. 2 (5th ed.) It is to be specially noticed that what made it manslaughter was, that, in order to defend his castle, it was not necessary to kill the bailiff.

The same idea of *necessity*, in order to relieve the killing from being manslaughter, exists in the case of defending one's person, as stated in Hawkins P. C. 113: "Homicide *se defendendo*

seems to be when one who has no other possible means of preserving his life from one who combats him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such an inevitable necessity."

In a learned note in 2 Archb. Cr. L. 225, it is said: "But when it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification,—that he shall not, except in extreme cases, endanger human life, or great bodily harm. \* \* \* \* You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. It is, therefore, clear, that if one man deliberately kills another to prevent a mere trespass on his property—whether that trespass could or could not otherwise be prevented—he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own."

*Harcourt's* case, 5 Eliz. stated 1 Hale P. C. 485-6, shows that this doctrine is not new. "Harcourt, being in possession of a house by title, as it seems, A. endeavored to enter, and shot an arrow at them within the house, and Harcourt, from within, shot an arrow at those that would have entered, and killed one of the company. This was ruled manslaughter, and it was not *se defendendo*, because there was no danger of his life from them without." What was thus ruled is the key to the author's meaning in the next following paragraph of his book, which see.

The idea that is embodied in the expression that, a man's house is his castle, is not that it is his *property*, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and



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of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

This is the meaning of what was said by HOLROYD, J., in charging the jury in *Meade's* case, 1 Lewin O. O. 184. Some exasperated sailors had ducked Meade, and were in the act of throwing him into the sea, when he was rescued by the police. As the gang were leaving, they threatened that they would come by night and pull his house down. In the middle of the night a great number came, making menacing demonstrations. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Meade was indicted for murder. Upon that state of facts and evidence, the judge said to the jury: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger, &c. \* \* But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle; and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault; nor will they authorize an assault in return, &c. \* \* There are cases where a person in heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up by way of making an attack, and without there being any

previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. In the present case, if you are of opinion that the prisoner was really attacked, and that the party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he, perhaps, was justified in firing as he did. If you are of opinion that he intended to fire over and frighten, then the case is one of manslaughter and not of self-defence."

The sense in which one's house is his castle, and he may defend himself within it, is shown by what is said in 1 Hale P. C. 486, that "in case he is assaulted in his own house, he need not flee as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight." Now, set over against that what is said in 1 Russell, 662, and the true distinction between the house as *property*, on the one hand, and as *castle for protection*, on the other, is very palpable, viz: "If A. in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is, at least, common manslaughter, unless, indeed, there were danger of life;" p. 663. "But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of a deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass." In *Carrol v. The State*, 24 Ala. 36, it is said: "The owner may resist the entry into his house, but he has no right to kill, unless it be rendered necessary in order to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm." Cited 2 Bishop Crim. Law, § 707, 5th ed. That case impresses us differently from what it does the learned author, as indicated by his remark prefacing the citation.

As developing and illustrating the prevailing idea of the law as to what will justify homicide *se et sua defendendo*, it is not without interest upon the point now under consideration, to advert to what is said upon the general subject. In *McNally*, 562, it is

said : "The injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger ; and if in such conflict he happeneth to kill, such killing is justifiable." Wharton incorporates this into his work as text. The same is found in the older books. 1 Hale, 485-6 ; also in Foster's Crown Law, 273 ; 1 Russell, 667 ; and in other books, *ad lib.* But, to apprehend this in its true scope and application, it is important to have in mind what is said in 1 Russell, 668 : "The rule clearly extends only to cases of felony ; for if one come to beat another, or take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him, it is manslaughter. \* \* \* No assault, however violent, will *justify* killing the assailant under a plea of necessity, unless there be a manifestation of *felonious* intent." See Archb. Crim. Law, 221, cited 9 C. & P. 22.

This covers the cases of statutory justification of homicide, both under our own, and under the English, statutes, and, in principle and in reason, it is in keeping with the common law as to *se defendendo*, in defining the scope of which in this respect, it is well laid down that, "before a person can avail himself of the defence that he used a weapon in defence of his life, it must appear that that defence was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger." 1 Russell, 661.

The law of the subject, as given in the books thus cited and referred to, seems to have been adequately apprehended by the court, and, so far as we can judge from what is shown by the record before us, it was not administered erroneously or improperly in the trial, as against the respondent.

If it were to be assumed that the defense might legitimately claim that there was an assault on the house, with the intent either of taking the life of the respondent, or doing to him great

bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under the existing circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and, in fact, did believe, that it was necessary in order to prevent the commission of such crime. In case the purpose of the assailant was to take life, or inflict great bodily harm, and the object of his attack (if there was such attack) upon the house was to get access to the inmate occupying the same, for such purpose, the same means might lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case, the point of justification is, that such use of fatal means was necessary in order to the rightful, effectual protection of the respondent, or his family, from the threatened or impending peril.

We have been led to this discussion and exposition of the law as to the defense of the dwelling-house, on account of the somewhat fragmentary and disjointed condition in which it is done up in the books and cases of criminal law, and for the purpose of rendering as explicit as we are able the views of this court on that subject, as it has been brought into question and debate in the case in hand. In this exposition, and in the views embodied in this opinion, all the members of the court concur.

The other subjects involved in grounds and points of defense, as shown by the bill of exceptions, and upon which the court gave instructions to the jury, do not seem to require discussion.

The verdict is set aside, and new trial granted.

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Stephens, appellant, v. Joyal, administratrix, appellee.

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ARETUS STEPHENS, APPELLANT, v. MARGARET JOYAL, ADMINISTRATRIX OF JOSEPH E. JOYAL'S ESTATE, APPELLEE.

*Evidence. Deposition.*

Upon the question of whether the witness's father was living in October, 1855, the witness testified that he supposed he died in 1854. On cross-examination the witness denied having said that he received a letter in 1861, stating that his father was dead, but that he knew better, as the letter was in his father's handwriting,—and also denied telling his sister-in-law in 1861, that his father had gone back to live with his mother again; and it was *held* error for the county court to exclude testimony offered by the other side, to prove that the witness had made the statements which he denied.

The citation for taking a deposition described the parties as, "Aretus Stephens is plaintiff, and Margaret Joyal, so called, administratrix of the estate of Joseph E. Joyal, is defendant." The caption described them as, "Aretus Stephens as plaintiff, and Margaret Joyal, so called, is administratrix, is defendant." On the docket the case was entitled, "Aretus Stephens v. Joseph E. Joyal's Estate." The said Margaret was in fact the defendant in the suit. *Held*, that the deposition was admissible.

APPEAL from a decree of the probate court, assigning to the said Margaret, who claimed to be the widow of the said Joseph, who died intestate, all the real and personal estate of the decedent. The court, at the April term, 1872, ROYCE, J., presiding, affirmed the decree of the probate court.

The only question on trial was, whether at the time of her marriage to the said Joseph, the said Margaret's former husband, George Edwards, was living. She was married to said Edwards in 1842, at Highgate, Vermont, and lived with him till May, 1854, and had six children by him. She was married to the said Joseph in October, 1855, in the state of New York. The defendant introduced as a witness Adam Edwards, son of George Edwards and the said Margaret, who testified that he supposed his father died in 1854; and on cross-examination testified that he never said he had received a letter in 1861, stating that his father was dead, but that he knew better, as the letter was in his father's handwriting. He also denied having told his sister-in-law in 1861 that his father had gone back to live with his mother. The plaintiff offered a witness to show that in 1861 the witness had a conversation with the said Adam Edwards, in which the said Adam told the witness that he had shortly before received a letter, stating that his father was dead, but that he knew he was

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not, as the letter was in his father's handwriting, and that it was done to keep his mother from following him. The plaintiff also offered to show by the said Adam's sister-in-law, and by her mother, that in 1861 he told his sister-in-law that his father had one back to live with his mother again. The plaintiff also offered a witness to show that shortly before the said Joseph and Margaret were married, the said Joseph came to the witness to borrow a dollar, and said that he was going to marry Margaret; that she was — smart, and if he did not get shot he didn't care. Also, to show that about three years after this, the witness again saw the said Joseph, who told him he was afraid he might get shot; that he was satisfied Margaret had another husband living, and he thought it a good time to leave, and he had left, as "he might get a ball put through him." The plaintiff also offered a witness to show that in 1861 the witness was loading a vessel at Port Henry, N. Y., when one Lucas, with whom the witness was acquainted, came on board with a man whom he introduced to the witness as George Edwards; that the usual salutations were exchanged, and the witness inquired of said person if he had a son William Edwards, living in Highgate, and he said he had. The plaintiff further offered to show that the witness was acquainted with William Edwards, and that two or three years after the occasion aforesaid, the witness was in the army, and there saw the said William and talked with him about his father, and that the said William then told him that his father was living, and that he had just had a letter from him. To the admission of all which testimony the defendant objected, and the court excluded the same; to which the plaintiff excepted.

The plaintiff offered the deposition of Richard Moore, to which the defendant objected, because in the citation the parties were described as, "Aretus Stephens, plaintiff, and Margaret Joyal, so called, administratrix of the estate of Joseph E. Joyal, is defendant"; while in the caption the description was, "Aretus Stephens is plaintiff, and Margaret Joyal, so called, is administratrix, is defendant." The case was entitled on the docket, "Aretus Stephens v. Joseph E. Joyal's Estate" The court excluded the deposition; to which the plaintiff excepted.

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Stephens, appellant, v. Joyal, administratrix, appellee.

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*Davis & Adams*, for the plaintiff.

1. The statements made by Joseph E. Joyal shortly before his marriage to Margaret, and again three years afterwards, should have been admitted. *Holbrook et als. v. Murray et al.* 20 Vt. 525; *Miller v. Wood et al.* 44 Vt. 378.

2. The testimony offered to show that in 1861 Adam Edwards made the statements referred to in the case to the witness, and the declaration to his sister-in-law, were clearly admissible. He, on the examination-in-chief, was permitted to testify that he supposed his father died in 1854. If this testimony was not admissible as tending to show that such was the fact, certainly, testimony to show that in fact he did not so suppose, was clearly admissible. *Holbrook v. Holbrook*, 30 Vt. 432; *State v. Dennin*, 32 Vt. 158; *McAuley v. Western Vt. R. R. Co. et al.* 33 Vt. 311; *Hutchinson v. Wheeler*, 35 Vt. 330.

3. The deposition of Richard Moore was improperly excluded. *Carr & Blanchard v. Manahan*, 44 Vt. 246; *McCrillis v. McCrillis*, 38 Vt. 135; *Adams v. Flanagan et al.* 36 Vt. 400; *Perrin v. Granger et al.* 33 Vt. 101.

*Royce & Hall and Pelton*, for the defendant.

The parol testimony offered by the plaintiff and excluded by the court, was of such a character as not to be admissible in any case—not even to impeach Adam Edwards. For that part of his testimony which some part of this evidence would apparently contradict, was drawn out on cross-examination; and being new matter, he, as to that, became their own witness, and they cannot, in this manner, impeach him.

The deposition of Richard Moore was properly excluded. All parties to the suit, both plaintiffs and defendants, must be correctly named in the caption and certificate of the deposition. *Dupy v. Wickwire*, 1 D. Chip. 237; *Swift v. Cobb et als.* 10 Vt. 282; *Haskins v. Smith et als.* 17 Vt. 263.

The opinion of the court was delivered by

REDFIELD, J. I. The appellee improved Adam Edwards as a witness, to prove that his father, George Edwards, (the former

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husband of the defendant administratrix,) died in the year 1854; and on cross-examination, he denied that he had ever said "that he received a letter in 1861, stating that the said George Edwards was dead, but he knew better, as the letter was in his father's handwriting." He also denied that he had told his sister-in-law, in 1861, that "his father (the said George Edwards) had gone back to live with Margaret again." The appellant then offered to prove by the sister-in-law of said Adam, and other witnesses, that the witness did make the declarations which he denied on the stand. These declarations were clearly inconsistent with the testimony of the witness given in chief; and we think the testimony admissible to contradict and impeach the witness. The counsel for the appellant, in argument, claim that the testimony was admissible as substantive evidence to prove that the said George Edwards was living in 1861; and it is not improbable that the court may have understood that the evidence was offered solely for that purpose. But, for the purpose of impeachment, it was admissible, and its exclusion for all purposes, we think was error.

II. The deposition of Richard Moore was rejected on the ground of defect in the caption. The parties are described in the citation as, "Aretus Stephens is plaintiff, and Margaret Joyal, so called, administratrix of the estate of Joseph E. Joyal, is defendant"; while in the caption, the parties are described as, "Aretus Stephens as plaintiff, and Margaret Joyal, so called, is administratrix, is defendant." On the docket the case is entitled, "Aretus Stephens v. Joseph E. Joyal's Estate." There is no claim that the adverse party suffered for want of notice, by reason of defect in the citation; and the docket entry is no part of the deposition; nor does it necessarily give the true title of the case. The sole inquiry is as to the sufficiency of the title of the case and description of the parties, in the caption of the deposition. The statute form requires that the caption should state the names of the plaintiff in the "cause." The plaintiff is properly named in this caption; and the defendant is stated to be "Margaret Joyal, administratrix," but the estate which she represents is not named, and we think it not necessary that it should be.



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Margaret Joyal is, in fact, the *party defendant*. She represents the estate, but the estate is not the party. The caption states that she defends as administratrix. It was held in *Dupy v. Wickwire, qui tam*, 1 D. Chip. 237, referred to by the defendant, that the caption of a deposition in a suit brought *qui tam*, need name only the prosecutor as plaintiff, omitting the *qui tam*. The "*qui tam*" is merely descriptive of the *character* of the suit, but not a necessary part of the name. An administrator may in many cases, declare in his own name in matters touching the estate, omitting altogether allegations of his representative character. *Perrin v. Granger et al.* 33 Vt. 101; *Aiken v. Bridgman*, 37 Vt. 249. No case has been cited, and we are aware of none in this state, that would establish so stringent a rule as would exclude this deposition for defective caption. And since by statute the use of *ex parte* depositions is excluded, the court feel no inclination to extend the criticism of technical forms, for the purpose of excluding testimony taken on fair notice to the adverse party. A substantial deviation from the requirements of the statute, especially when the adverse party may have suffered thereby, must always operate to exclude the testimony. But we do not deem this of such a character. We think the deposition legally admissible for some purposes, and that its exclusion was error.

The judgment of the county court is therefore reversed, and the cause remanded.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF ADDISON,  
AT THE  
JANUARY TERM, 1873.

PRESENT:

HON. ASAHIEL PECK, HON. HOYT H. WHEELER, HON. TIMOTHY P. REDFIELD, HON. JONATHAN ROSS,	}	ASSISTANT JUDGES.
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JOSIAH S. CHANDLER v. THE TOWN OF BRISTOL.

*Soldier's Bounty. Contract.*

The defendant authorized its selectmen to offer a bounty of \$225 to each volunteer, to fill its quota under a certain call. Afterwards, the orderly sergeant of the plaintiff's company in the field, wrote to R., one of the defendant's selectmen, in behalf of O., a member of the same company, inquiring what bounty the town would pay for volunteers, and R. replied that the town would pay \$250. The plaintiff heard R.'s letter read in presence of his company, and, relying upon the statements thereof, and expecting to receive the bounty, re-enlisted to the credit of the defendant, reserving the right, and having the privilege, of changing his credit to any other town, before muster. Before muster, the plaintiff, learning that the town of S. was paying a larger bounty, directed the proper officer to change his credit to S., which was never done; but the plaintiff served till the close of the war, supposing he was credited to S. The plaintiff gave the defendant no notice of his enlistment to its credit, until after his discharge, but the defendant had the benefit of his credit.

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Chandler v. Bristol.

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*Held*, that the foregoing facts tended to show a contract between the plaintiff and the defendant.

*Held*, also, that the plaintiff's attempt to get his credit changed as aforesaid, did not prejudice his right of recovery against the defendant.

*Held*, also, that the fact that the "defendant received the benefit of the plaintiff's credit,"—in the absence of any evidence that he applied on any other quota, or that the town had another quota,—tended to show that he applied on the quota named in said vote.

*Held*, also, that if the town suffered no damage for want of earlier notice of the plaintiff's enlistment to its credit, earlier notice was not necessary.

'ASSUMPSIT for a town bounty. Plea, the general issue, and trial by jury, PIERPOINT, Ch. J., presiding.

The call of the president for 300,000 men, made Oct. 17, 1863, was admitted. It appeared that the quota of Bristol under said call was nineteen men. At a town meeting of said Bristol, duly warned, and held on the 28th day of November, 1863, the town voted to authorize the selectmen to offer a bounty of \$225 to each volunteer, not exceeding the quota of the town, who should enlist and be accepted and mustered into the United States service under said call. The plaintiff re-enlisted into the service of the United States, at Brandy Station, in Virginia, December 15, 1863, and was mustered into service on the 24th or 25th of the same month, the date of his muster-in being antedated on the roll to the 16th of said December.

The plaintiff introduced evidence tending to show that one Cook, who was then orderly sergeant of the company of which the plaintiff was then a member, wrote to different towns in this state, in behalf of the men of his company, inquiring what bounties they were severally paying, and that among others, said Cook wrote to William Rider, then one of the selectmen of Bristol, for Lucius Orcutt, one of the members of the same company, inquiring what bounty the town of Bristol would pay to volunteers who would enlist to the credit of that town, and received from said Rider a reply, prior to the enlistment of the plaintiff, stating that Bristol would pay \$250 to such volunteers as should so enlist and be credited to said Bristol, and that said letter was read in the presence and hearing of said company; that the plaintiff heard said letter so read, and relying upon the statements therein, and expecting to receive said bounty, did, thereupon, re-enlist and cause his name to be credited to said town of Bristol, reserving the right to change it to any other town before being mustered in.

It appeared further, that re-enlisted men had the privilege after enlistment, at any time before being mustered into service, to change their credit to any other town than the one to which they stood credited, and that the plaintiff, after his enlistment and

credit to the town of Bristol as aforesaid, and before being mustered in, upon learning that the town of Starksboro was paying a higher bounty than Bristol, directed the proper officer to change his credit from Bristol to Starksboro, and that he went on and served out his time until the close of the war, supposing that he was credited to the town of Starksboro; that after his discharge from service, in June, 1865, he applied to Starksboro for his bounty, and learned that his name did not stand to the credit of that town, but to Bristol, as he had first directed; that he then applied to the town of Bristol, which had received the benefit of his credit, and that Bristol refused to pay the bounty. This was the first notice he gave the town of Bristol that he had re-enlisted to its credit.

Upon the foregoing facts, the court directed a verdict for the defendant; to which the plaintiff excepted.

*J. W. Stewart*, for the plaintiff.

The only question in the case arises from the plaintiff's attempt to change his credit from Bristol to Starksboro. The right to change his credit was reserved, and there was an ineffectual attempt to exercise such right. He expressed a purpose, but the concurrent act necessary to make it effective, was not done, and the parties remained *in statu quo*. There is, then, no legal want of assent, for the subsequent execution of the contract by the plaintiff, relates to the assent expressed in the first step by the plaintiff, to wit, enlisting to the credit of Bristol, which step was never, in point of fact, retraced. The defendant has received the full consideration of its promise, and it would be a denial of justice to excuse payment.

*A. V. Spaulding and W. W. Rider*, for the defendant.

The case does not show any *contract* by the parties. On the contrary, it shows that there was none, and that there were no elements of a valid contract, such as to lay the foundation for a cause of action; consequently, there were no facts for the jury to find. 1 Parsons Cont. 5.

The case shows, conclusively, that the plaintiff was not mustered into the service, relying on the bounty that Bristol was promising to pay; but that he did not accept the offer of Bristol (if one

was made to him, which we deny ), and repudiated it wholly. It makes no difference that his credit was not changed, as he directed ; so far as his own volition and intention in the matter *could* control and govern it, it was consummated. Under the vote of the town, two things were essential to entitle a party to a bounty ; first, a contract with the selectmen ; second, application on the quota of the town under the call named in the vote. The exceptions show neither of these conditions complied with by the plaintiff. *James v. Starksboro*, 42 Vt. 602 ; *Hicks v. Lyndon*, Ib. 606 ; *Johnson v. Bolton*, 43 Vt. 303 ; *Slack v. Craftsbury*, Ib. 657 ; *Bucklin v. Sudbury*, Ib. 700. Reasonable notice to the town of the plaintiff's re-enlistment, was necessary, even if he had otherwise complied with the conditions of the vote. *Bucklin v. Sudbury*, *supra*.

The opinion of the court was delivered by

PECK, J. It is insisted on the part of the defense that there was no evidence tending to show a contract between the plaintiff and the town for the payment of a bounty. But when the orderly sergeant of the company in which the plaintiff was serving in the field as a soldier in Virginia, wrote from there to Rider, selectman of Bristol, "inquiring what bounty, the town of Bristol would pay to volunteers who would enlist to the credit of that town," it must have been understood by Rider from that letter that the information was wanted with the view of being acted on by soldiers then in the field, by re-enlistment to the credit of that town ; and when that selectman replied to that letter, "stating that Bristol would pay two hundred and fifty dollars to such volunteers as should so enlist and be credited to said Bristol," it must have been intended as a general offer to such soldiers then in the field as would comply with it ; at least, to the extent of the authority given by vote of the town, and that it might be so acted on ; and the plaintiff had a right so to understand it, and act upon it. Such has been the construction of language substantially like this, when incorporated in the vote of a town, although not in answer to any application on the subject. When the plaintiff afterwards heard the letter from that selectman read in the

presence and hearing of said company, and relying upon the statements therein, and expecting to receive said bounty, did thereupon re-enlist, "on the 15th December, 1863, and caused his name to be credited to said town of Bristol," he acted on the faith of, and in compliance with, the offer; and when, on the 24th or 25th of the same December, he was mustered in to the credit of Bristol, under date of the 16th of the same December, he had complied with all the terms expressed in the offer.

But it is insisted that the plaintiff, at the time of his enlistment, having reserved the right to change his credit to some other town before being mustered in, and having, within that time, directed the proper officer to change it to Starksboro, and having supposed during his service that it was so changed, thereby deprived himself of all claim on Bristol, which he otherwise might have had, although it was never changed, but remained to the credit of Bristol, and enured to its benefit. It appears that re-enlisted men had the right to change their credit after enlistment, before being mustered in. But the reservation of such right, unexercised, does not prejudice the plaintiff's claim. The change of the credit required an act to be done, to be evidenced by the record. A mere mental conclusion, or simple volition on the part of the plaintiff, was ineffectual to change the rights of the parties; nor did the direction to the proper officer to change the credit, give any additional force to such volition, as nothing was done to effect the change, or to prejudice the defendant in the full benefit of the credit as given in the enlistment; but, on the contrary, by the muster-in, the credit was irrevocably fixed to the benefit of the defendant town. If A. and B. enter into contract, with a right reserved to B. to rescind by giving notice to that effect within a specified time, and B., within the specified time, directs his agent to give such notice, which the agent wholly neglects to do; A. would thereby acquire no right to treat the contract as rescinded, against the will of B., even if B. had supposed, up to the time fixed for the performance of the contract, that the notice requisite to rescind the contract had been given as he directed. And most clearly the defendant cannot in this case so treat the reservation of the right to the

plaintiff to withhold his credit, between the enlistment and the muster-in, from the defendant, and have it placed to another town, from the simple fact that he directed it to be so done, when it was never done, and when the defendant has received the benefit of the full performance by the plaintiff. *Davis v. Landgrove*, 48 Vt. 442, is in point, as the same principle applies to a general offer made by the selectmen, by authority of the town, as to a general offer by vote of the town. *Williams v. Carwardine*, 4 B. & Ad. 621; S. O. 5 O. & P. 566.

But, it is claimed that it does not appear that the plaintiff applied on the quota of the town under the call for 800,000 men referred to in the vote. The exceptions are not very explicit in relation to this; but it is stated that after the plaintiff was discharged from service, in 1865, he "applied to the town of Bristol, *which had received the benefit of his credit*, and that Bristol refused to pay the bounty." We understand this as a statement that the town of Bristol received the benefit of the plaintiff's credit; and, in the absence of any evidence that he applied on any other quota, or that the town had any other quota to fill, we think it tends to show that he applied on the quota in question. It is also claimed on the part of the defense, that the plaintiff did not give seasonable notice to the town of his enlistment. But if the town had the benefit of his credit on the quota referred to in the vote, the inference is, in the absence of evidence to the contrary, that the town suffered no detriment for want of earlier notice; and, if not, earlier notice was not necessary to the right of the plaintiff to recover.

The conclusion is that the county court erred in directing a verdict for the defendant. Judgment reversed, and new trial granted.

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Matteson v. Holt & Hawkins.

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## ELIAS H. MATTESON v. HOLT &amp; HAWKINS.

*Contract. Rescission.*

The rule that the breach of an express warranty does not, in the absence of fraud, entitle the purchaser to rescind the contract of sale, considered and reaffirmed.

A purchaser may rescind the contract for fraud; but the right to rescind must be exercised at the earliest practicable moment after discovery of the ground therefor.

The defendant purchased a yoke of oxen of the plaintiff which were eight years old, but which the plaintiff fraudulently represented to be only seven years old. The second day after the defendants took the oxen, one E. informed them that, in his opinion, judging from their appearance, the oxen were nine years old. The defendants continued to use the oxen five days after that, when they returned them to the plaintiff, and notified him that they were not as represented; but the plaintiff refused to receive them. *Held*, that the defendants exercised their right of rescission within a reasonable time.

ASSUMPSIT for the price of a yoke of oxen sold by the plaintiff to the defendants, originally brought before a justice of the peace, and appealed to the county court and referred. The referee found the following facts :

On the 27th of April, 1870, the defendant Holt told the plaintiff that he wanted to purchase a yoke of oxen, not under five or over seven years of age—what work he wished them to perform—where they were to work—and that they must have good feet to hold shoes. The plaintiff said his oxen were only seven that spring, that they could do as much work as any other yoke of oxen, and that the foot of the ox with the broken claw, was all right, and only required a peculiar shaped shoe. On these representations, defendant Holt purchased said oxen for \$180, agreeing to pay for them on the 15th of May, 1870, the plaintiff agreeing to have them shod anew all round, and to deliver them to the defendants on the 28th of April, 1870. The plaintiff carried out his agreement as to the delivery, but not as to the shoeing, of the oxen. The first day following the delivery, the oxen were put to light work. The second day, they performed the same amount of work, and threw their shoes. The same day they were taken to the shop of one Ellis to be shod. While there, Ellis called the attention of defendant Holt to the age of the oxen, and said that, in his judgment, they were nine years old, judging from the wrinkles on their horns; also, to the foot of the ox with a broken claw, that it was soft and spongy, and would not hold nails. The third day was Sunday. The fourth day they performed the same amount of work, and lost one shoe.



The fifth day they performed double the amount of work. The sixth day they performed no work. On the morning of the seventh day, the oxen were returned to the plaintiff during his absence, with a letter from the defendants that the oxen were not as represented by the plaintiff. On his return, the plaintiff refused to receive and treat the oxen as his property. One of the oxen was returned in good condition, the other, lame, and appeared as if foundered; since then, diseased, and of little value.

The defendants claimed that the oxen were incapable of endurance and performance in the service which was described, equal to any other yoke. The oxen while in the possession of the defendants, were not overloaded, overworked, or overfed, and were carefully handled, except at the time they were returned to the plaintiff, when they were driven too rapidly; but they were incapable of performing the work for which they were purchased by defendants.

The defendants claimed that the plaintiff fraudulently represented as to the soundness of the foot of the ox with the broken claw, and as to the age of the oxen not being over seven years. The plaintiff claimed that the defendants should have rescinded the contract, if at all, at the time their attention was called by Ellis to the age of the oxen being nine years, in his judgment, and to the unsoundness of the foot, and not to have continued their use until they were disabled, and then to have returned them. The oxen while in the possession of plaintiff, were capable of, and did perform hard service until about six weeks before the said sale, when the plaintiff had no work for them to perform at that season of the year; and the plaintiff did not know of the unsoundness of the foot of the ox with the broken claw, at the time of said sale. The plaintiff knew at the time of the sale that the oxen were eight years old, and he fraudulently represented their age to be only seven at the time of said sale to said defendant Holt.

The referee found for the defendants to recover their costs.

The court, at the December term, 1872, PIERPOINT, Ch. J., presiding, rendered judgment on the report for the defendants. Exceptions by the plaintiff.

*A. P. Tupper*, for the plaintiff.

The finding of the referee of the fact that the defendant Holt told the plaintiff where, and what work the oxen were wanted to perform, will not affect the plaintiff's right to recover the price, even though he finds that they "were incapable of performing the

work for which they were purchased"; for the recommendation of the plaintiff that they could do as much work as any other yoke of oxen, was based upon his knowledge of what they had done, as mere commendation. 2 Kent Com. 484-5. "*Simplex commendatio non obligat.*"

The representations as to the broken claw were based on the plaintiff's knowledge. The defect was equally open to Holt, and was examined by him. The defendants run their own risk as to that.

The report finds that the oxen were one year older than the plaintiff represented, and that in this there was fraud. If fraud at all, it must have been such as would have prevented the trade. *Howard v. Gould*, 28 Vt. 523; *Paddock v. Strobbridge*, 29 Vt. 470. At least it must have the effect to determine the defendants to rescind immediately upon discovery of the fraud, and on that account. *Downer v. Smith*, 32 Vt. 1.

The defendants were not at liberty to rescind the trade. If such had been their right, they were bound to rescind *in toto*, and place the plaintiff *in statu quo*. *West v. Cutting*, 19 Vt. 536; *Fay v. Oliver*, 20 Vt. 118; *Loomis v. Wainwright*, 21 Vt. 520, 528; *Hammond v. Buckmaster*, 22 Vt. 375; *Wallace v. Stone*, 38 Vt. 607; *Montgomery v. Bush*, 43 Vt. 167; Chit. Cont. 573; 2 Kent Com. 479, *et seq.* And in case of fraud, the defendants were not at liberty to rescind, if, after they had discovered the fraud, they put it out of their power to place the plaintiff *in statu quo*. *Downer v. Smith*, *supra*; 2 Kent Com. 480; Chit. Cont. 362, *et seq.*; 2 Stark. Ev. 645, and note; *Conner v. Henderson*, 15 Mass. 319; *Curtis v. Hannay*, 3 Esp. 82; *Hunt v. Silk*, 5 East, 449; *Hoadley v. House*, 32 Vt. 179.

Will the law permit the defendants to keep the oxen five days after they were informed that they were older than represented, spoil them, or one of them, and return them worthless? Lord ELLENBOROUGH settles the question in *Curtis v. Hannay*, *supra*.

We deny that the facts reported are evidence of fraud. *Hoadley v. House*, *supra*.

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*Matteson v. Holt & Hawkins.*

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*Stewart & Eldridge*, for the defendants.

The facts reported show a breach of contract by the plaintiff in every particular. The defendants contracted for oxen not exceeding a certain age, and capable of performing a particular kind of service, which was particularly described. They made inquiry in regard to the defective foot. It was stipulated that the oxen should be shod before delivery. In each of these particulars, there was a breach by the plaintiff. As to age, the referee finds expressly that the plaintiff's representations were willfully and knowingly false and fraudulent.

A sale of a chattel with a representation of its nature or quality, which is false within the knowledge of the party who makes it, vitiates the contract; and such sale is voidable at the option of the vendee, who may either avoid it by returning the goods and bringing an action on the case for the deceit, or affirm it by keeping them, and give the fraud in evidence to diminish or defeat a recovery in a suit brought to enforce payment of the purchase money. *Downer v. Smith et al.* 32 Vt. 1; *Mallory v. Leach*, 35 Vt. 156; *Bryant v. Isburgh*, 13 Gray, 607.

The finding of the referee is conclusive as to the reasonableness of time within which the defendants exercised the right of rescission. The defendants were not only not bound, but would not have been justified in taking as conclusive, on the question of age, the mere opinion of the blacksmith, founded on certain appearances. They did, as the report expressly finds, use the cattle carefully in their business, and treat them well until they had ascertained the falsity of the plaintiff's representations, which was within several days, when they returned them.

Having received them upon a representation inducing the purchase, which the plaintiff knew was false when he made it, they returned them as soon as they were satisfied of the fact. The case shows only a portion of two days' service after the expression of the blacksmith's opinion, which was succeeded by an interval of one day's rest—the sixth day—and on the seventh day they were returned.

If necessary to the defense, it might with propriety be urged that, upon the facts found, the defendants had the right of rescis-

sion independent of fraud. The case of *West v. Cutting*, 19 Vt. 536, is relied on *per contra*. In that case, Judge REDFIELD assumes that the law is well settled the other way in this country and in England; whereas, both reason and the weight of authority are that upon breach of express warranty, the right of rescission exists. *Bryant v. Isburgh*, 13 Gray, 607, and cases there cited.

It is a curious fact that in the leading English case of *Street v. Blay*, 2 B. & Ad. 456, relied upon in support of the rule as recognized in *West v. Cutting*, the question was not necessarily raised, because the vendee had himself sold the property without warranty, and repurchased it at a profit, so that the right of rescission was of course lost.

It will be found that the earlier English cases did not deny the right of rescission, and that the only point of objection relates merely to the form of action, on the ground that general assumpsit for money cannot be maintained, for want of notice that a question of warranty is to be tried.

In cases like the present, when the consideration has not been paid, and the defense is interposed as an answer to an action to recover the price, the reason of the objection wholly fails, and the application of the rule, as recognized in England prior to 1831, and at this time by at least three New England states, would prevent circuitry of action, to say nothing of its intrinsic justice.

But, whatever view the court may take of this point, the finding of the referee upon the question of fraud must be conclusive.

The opinion of the court was delivered by

REDFIELD, J. This action is assumpsit to recover the price of a yoke of oxen. The defendants told the plaintiff that they wished "to purchase a yoke of oxen not under five nor over seven years of age; what work they wished them to perform; where they were to work; and that they must have good feet to hold shoes." Plaintiff replied that "his oxen were only seven that spring; that they could do as much work as any other yoke

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Matteson v. Holt & Hawkins.

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of oxen, and that the foot with the broken claw was all right, and only required a peculiar shaped shoe." On these representations, defendants purchased said oxen, took the possession, and agreed to pay therefor \$180 on a day named.

The report of the referee states that the broken claw was spongy, and would not hold a shoe; that the oxen "were incapable of performing the work for which they were purchased"; that they were over seven years old, at least eight, and that known to the plaintiff at the time of the sale. On the seventh day after sale, they were returned to the plaintiff by the defendants, with notice that they were not as represented. They were left in plaintiff's possession, but he refused to receive them. One of the oxen at that time "was lame, and appeared as if fundered, since that, diseased, and of little value."

The representation of the plaintiff, and relied upon by the purchasers, as to the condition and quality of the oxen, was doubtless a warranty, and the plaintiff liable in damages for the breach. But it has been held in this state that the breach of an express warranty does not entitle the purchaser to rescind the contract of sale. *West v. Cutting*, 19 Vt. 536; *Hoadley v. House*, 32 Vt. 180. The defendants are not content with these adjudications, and insist that the weight of authority is the other way; but we think otherwise. In Massachusetts and Maryland, their courts have held "that an express, or implied warranty may be treated as a condition subsequent, by the purchaser, and the sale avoided for the breach, if he sees fit to enforce the forfeiture." *Bryant v. Isburgh*, 13 Gray, 607; *Perley v. Balch*, 23 Pick. 283; *Dorr v. Fisher*, 1 Cush. 274; *Hyatt v. Boyle*, 5 Gill & Johns. 121. But these are exceptions to the general current of authorities, and we see no reason to question the statement of Ch. J. REDFIELD, in *West v. Cutting*, *supra*, that a broken warranty "will only enable the vendee to recover damages for the breach, but will not entitle him to rescind, and recover back the consideration. This is well settled, both in this country and in England." If this were not so, there is good ground for holding that defendants kept and used the oxen an unreasonable time after testing their quality, and learning that they were not what they were rep-

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Matteson v. Holt & Hawkins.

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resented to be. The right of rescission must be exercised at the earliest practicable moment after discovery of the defect. The defendants were aware that the feet of the oxen would not hold shoes, as early as the second day after the purchase ; they kept and used them until the seventh. But the referee has reported that the plaintiff knowingly misrepresented the age of the oxen. It was an express stipulation of the contract, that the oxen were not to be over seven years of age. The fact that defendants made that express provision, is evidence that, to them, it was *material*, and that they would not have made the purchase if the truth had, in this respect, been told them. There is no doubt that a purchaser may rescind a contract for *fraud*. And, this representation being in a matter material to the purchasers, the defendants have the right to rescind the contract, if that right was timely exercised.

The defendants were informed by Ellis, their blacksmith, on the second day, that, in his judgment, the oxen were nine years old. He judged merely from their appearance. They continued to use them carefully after that for five days, and then returned them to the plaintiff, with notice that they were not what he represented. The suggestion of Ellis was a mere opinion, and not necessarily convincing evidence, but such as should put the defendants on inquiry. We do not think that the length of time the defendants kept the oxen after the suggestion of Ellis, under the circumstances, unreasonable, or that it should operate to bar the defendants' right of rescission.

The judgment of the county court is therefore affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF RUTLAND,  
AT THE  
FEBRUARY TERM, 1878.

PRESENT:

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. ASAHEL PECK,  
HON. HOMER E. ROYCE, } ASSISTANT JUDGES.  
HON. JONATHAN ROSS, }

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ARUNAH HANKS v. HENRY LATHE, EXECUTOR OF SYLVANUS B.  
LATHE.

*Will. Construction.*

The testator, after giving a legacy to his wife, gave the residue and remainder of his estate to his son, upon condition that, if "I should not return alive from the journey I contemplate making this summer with my wife, there is to be paid out from that part of my estate that is here given to my son, \* \* \* to H., the mortgage I hold against L. H. \* \* \* But should I return, and during my life make over said mortgage to H., my son's share is to be relieved from the payment of said legacy" to H. The testator returned from said journey, but did not make over said mortgage to H. The whole of the testator's estate was not sufficient to pay his wife's legacy. *Held*, that said mortgage belonged to his wife.

APPEAL from the probate court. The only question in the case arose upon the construction of the will of the said testator,

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Hanks v. Lathe, executor.

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dated on the 18th day of July, 1865. That portion of the will material to be stated is as follows :

\* \* \* \* \* "I give and bequeath to my well beloved wife, Rhoda Lathe, the sum of two thousand dollars in money. I do also give my wife Rhoda, my best cow, or the choice out of my whole number of cows, one pig, or shoat, my best wagon, and all of my household furniture. All of the above legacies to be the said Rhoda Lathe's own property forever. I do, on reflection, give to my said wife Rhoda the further or additional sum of five hundred dollars. By household furniture I intend to include all beds and bedding. I do give to my said wife Rhoda all notes that she or I have, that are made payable to her, the said Rhoda Lathe.

\* \* \* \* \*

"I give and bequeath to my son, Henry Latho, all the residue and remainder of my estate, both real and personal, subject to the following conditions, viz: that if I should not return alive from the journey that I contemplate making this summer with my wife, there is to be paid out from that part of my estate that is here given to my son Henry Lathe, to the following named persons, the amount herein specified, to wit: to Arunah Hanks, the mortgage I hold against Levi Hanks; to Caroline Hanks, the sum of one hundred dollars; to Mark Warner, one hundred and twenty-five dollars, which he has hired and which he now owes me; to have and to hold the same during their natural lives, free from all debts and demands whatsoever as they think proper. But should I return, and during my life make over to the said Arunah Hanks the above named mortgage, and pay the said Caroline Hanks the sum of one hundred dollars, and give up to Mark Warner the sum of one hundred and twenty-five dollars, now due me; my son Henry Lathe's share is to be relieved from the payment of those legacies."

The defendant, the executor of said will, passed the Levi Hanks mortgage mentioned therein, to the said Rhoda, as part payment of her legacy of \$2,500. There was not enough of said estate, including said mortgage, to pay the said Rhoda her said legacy, into three hundred dollars or more. The plaintiff claimed that, by the terms of said will, said mortgage belonged to him, and should have been delivered to him by the defendant. When the testator made said will, he had sufficient property to pay all the legacies therein given, and all his debts. After making said



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Hanks v. Lathé, executor.

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will, he gave the defendant about \$2,000. The testator returned from the journey spoken of in said will; but did not give or make over said mortgage to the plaintiff.

The court, at the March term, 1872, WHEELER, J., presiding, adjudged that, under said will, said mortgage became and was the property of the said Rhoda; and affirmed the decree of the probate court allowing the account of the said executor, in which he credited himself with said mortgage as delivered to the said Rhoda as aforesaid, with costs. Exceptions by the plaintiff.

*Betts & Grover*, for the plaintiff, cited *Walton v. Walton*, 7 Johns. Ch. 262; *Gardner v. Printup*, 2 Barb. 83; *Sholl v. Sholl*, 5 Barb. 312; 2 Redf. Wills, 456; Willard Eq. Jur. 502-8; *Ashton v. Ashton*, 3 P. Wms. 384; Hawk. Wills, 294.

*Fayette Potter*, for the defendant.

The opinion of the court was delivered by

ROYCE, J. The testator, after making provision by his will for his wife, bequeathed all the residue and remainder of his estate (subject to the conditions named in the will) to his son Henry. The whole estate was insufficient to satisfy the legacy made to the wife. The residuary clause in the will was introduced for nothing more than a disposition of that portion of the estate that had not been previously disposed of. If any legacy was made to the plaintiff (which we do not decide), it was to be satisfied out of the residuum of the estate; and inasmuch as there was no residuum, there was no fund out of which to pay it. Consequently, the judgment of the county court is affirmed.

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Hunt & Little v. Haynes.

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## HUNT &amp; LITTLE v. HIRAM HAYNES.\*

*Book Account. Practice.*

No questions of law can be raised in the supreme court upon an auditor's report, except those arising either upon the facts reported by the auditor, or found and placed upon the record by the county court.

BOOK ACCOUNT, in favor of the plaintiffs as partners. The auditor made the following report:

"The plaintiffs were liquor merchants in Syracuse, in the state of New York, doing business there during the years 1860, 1861, and 1862. The defendant was, during that period, a customer of the plaintiffs, and engaged in selling liquor contrary to law, at Rutland, Vermont. The defendant was in the habit of purchasing liquor of the plaintiffs by sending them orders by mail from Rutland, and giving them directions to have the same marked with secret marks, and shipped to the defendant, at Rutland. The dealings between the parties extended from November 14, 1860. to October 29, 1862. The plaintiffs introduced testimony tending to prove that they were ignorant of the existence of liquor laws in Vermont, and had never been informed by defendant that he was selling the liquors purchased of them, in this state, contrary to law; that the false marks upon the casks created no suspicion in their mind, and that the defendant had never informed them, by letter or otherwise, that any portion of the liquor purchased of them, had been seized by the authorities in this state, and confiscated. The defendant swore, positively, that he informed two men who called at his shop, that some of said liquor had been seized; that his sale of liquor was contrary to law; and that he further informed the plaintiffs by letter, that some of the liquor which he had of them, had been seized; the plaintiffs denied that the two men who called were their agents; but the auditor finds that, though they were not in the employ of the plaintiffs, they were requested by the plaintiffs, as they were coming to Vermont, to call and investigate the defendant's business, that is, his solvency and prospects for future trade; that they did call in accordance with that request, and prior to the purchase of the liquor now in suit, and represented themselves to the defendant as the plaintiffs' agents, and the defendant had reason to suppose they were the plaintiffs'

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\* This case was decided at the January term, 1866.

agents, and so treated them upon his part ; and that, upon their return to Syracuse, they made due report to the plaintiffs. Should the court adjudge from the foregoing facts, that the defendant is liable to the plaintiffs for any balance, then the auditor finds that the sum of \$347.35 is due from the defendant to the plaintiffs to balance book accounts between them."

The court, at the September term, 1865, KELLOGG, J., presiding, rendered judgment, *pro forma*, on the report for the defendant ; to which the plaintiffs excepted.

*Prout & Dunton and R. S. Peabody*, for the plaintiffs.

*Chauncey K. Williams*, for the defendant.

The opinion of the court was delivered by

WILSON, J. This is an action on book, in which the plaintiffs seek to recover for liquor sold by them in New York, to the defendant, and sent to him at Rutland, in this state, at the request of the defendant. No question is made as to the amount the plaintiff should recover, if, upon the facts reported, they can sustain the action. The defense set up to the plaintiffs' right of recovery is, that the defendant was engaged in the business of selling intoxicating liquors in this state, contrary to law ; that he bought the liquors of the plaintiffs, with the intention of selling the same contrary to law ; and that the plaintiffs sold the liquors to defendant, knowing that they were to be used for an unlawful purpose ; and thereby it is claimed that the plaintiffs aided and abetted the defendant in his violation of the laws of this state.

The decision of the question, whether the plaintiffs were so far implicated in, or connected with, the unlawful traffic in which the defendant admits he was engaged, as to bar their right of recovery, would depend upon the facts which the auditor should have found from the testimony in the case, and reported to the court. The case shows that the plaintiffs, by the direction of the defendant, put secret marks upon the casks of liquor ; but it does not appear that the auditor found for what purpose the casks were thus marked. Some of the testimony of both parties tending to prove the material point in issue, is detailed in the au-

ditor's report ; but the report does not show what facts he found from the testimony, nor does it show that he found any facts decisive of the question in controversy. From the report, it is a matter of inference or conjecture merely, as to the facts the auditor found, and no question of law is raised as to the validity of the defense set up. It is well settled that, in order properly to raise questions of law, the facts in reference to each litigated point, should be found by the auditor, and set forth in his report ; and where the action comes into this court by exceptions, no questions can be revised, except questions of law arising, either upon the facts reported by the auditor, or found and placed upon the record by the county court. We think the defendant was not entitled to judgment. The judgment of the county court is reversed, and, at the request of the defendant, the case is remanded to the county court, to enable the auditor to find and report the facts.

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A. L. KELLOGG v. FOX & MINOGUE.

*Partnership. Conditional Sale by one Partner of his interest in the Partnership Property to a Third Person.*

The plaintiff, one of the partnership of B. & K., sold his interest in the business and property of the firm, including debts due them, to the defendants, upon condition that the property sold should remain the property of the plaintiff until paid for, and until the liabilities of said firm, which the defendants assumed, should be paid. B. retained his interest in the business, and kept along in it with the defendants. The defendants, with the consent and concurrence of B., and in the usual course of business, not having fully paid the plaintiff for said property, nor any of said liabilities, sold a portion of said property, without, at the time, intending to appropriate the avails thereof contrary to their agreement with the plaintiff; but they subsequently did appropriate said avails to their own private use, and abandoned said business. *Held*, that the plaintiff could not maintain trover against the defendants for the property thus sold by them.

TROVER for a quantity of slate mantels. Plea, the general issue, and trial by the court, March term, 1871, WHEELER, J., presiding.

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Kellogg v. Fox & Minogue.

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On the first day of September, 1870, and for some time previous thereto, the plaintiff, with one Patrick Burke, was engaged in the manufacture and sale of slate mantels, and other slate goods, at Fair Haven, in the county of Rutland, as equal partners, under the firm name of Burke & Kellogg. On that day, the plaintiff sold to the defendants, conditionally, all his interest in said business, and the property belonging to said firm, including all the debts due the firm, for the sum of \$1188.47; the defendants assuming the debts of said firm, amounting to \$1174.43. An inventory of the goods on hand at the time of the sale, was taken by the parties on said day, and all orders for goods then on hand were turned over to the defendants and to the said Burke, who retained his interest in the business.

The defendants paid to the plaintiff on the day of sale, the sum of \$600 in money, and gave two notes for the balance, dated September 1st, 1870; one, for the sum of \$300, payable in three months from its date, and the other, for \$238.47, payable in six months from its date, both payable to the order of A. L. Kellogg, and signed by Burke, Fox & Co. It was also agreed between the parties at the time of sale, that the property named in said inventory should be and remain the property of the plaintiff until said notes, and the debts of the firm of Burke & Kellogg, were paid, and the defendants made and executed to the plaintiff a contract as follows:

“Whereas, we, John C. Fox and Michael Minogue, both of Castleton, in the county of Rutland, have this day purchased of A. L. Kellogg, of Fair Haven, in said county, all his interest in the business now carried on by Burke & Kellogg, as well as all his interest in the property belonging to said firm, of every kind and description, including all debts due to said firm, and have executed our notes to him for the sum of five hundred and thirty-eight dollars and forty-seven cents, as follows; one for \$300.00, dated this day, and payable in three months; one for \$238.47, dated this day, and payable in six months from date—executed by Burke, Fox & Co.; and whereas, also, there are debts now outstanding against the late firm of Burke & Kellogg to the amount of \$1174.35, which we have assumed and are to pay: we hereby agree that the property this day purchased by us of him, as appears by the schedule hereto annexed, shall be and remain

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Kellogg v. Fox & Minogue.

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the property of the said Kellogg, and his assigns, until said notes, and the debts due from the firm of Burke & Kellogg, are fully paid.

Fair Haven, Sept. 1st, 1870.

Witness, }  
H. G. WOOD. }

JOHN C. FOX,  
MICHAEL MINOGUE."

Immediately after the execution of the foregoing contract, the defendants paid to the plaintiff the sum of \$600 in money, and delivered to him the notes therein named, and took possession of the property and entered upon the prosecution of said business as partners with the said Burke, under the name of Burke, Fox & Co.

The schedule referred to in said contract, and annexed thereto, was the inventory hereinbefore referred to. After taking possession of the property as aforesaid, the defendants continued in said business about six weeks, during which time, with the consent and concurrence of said Burke, they sold to one Stewart, of New York city, twenty of the same mantels which were embraced in the sale by the plaintiff to them, and received in payment therefor the said Stewart's note for the sum of \$455, and \$144 in money; and, soon after the receipt of said note and money by them, they abandoned said business and property, without offering to return the same, or any part thereof, to the plaintiff, and without giving him any notice of their intention, and took with them the note and money aforesaid, and converted the same to their own private use. The defendants, from that time, ceased to exercise any control over the business and property aforesaid, but have never returned, or offered to return, any part thereof to the plaintiff; nor have they ever paid either of the notes given by them to the plaintiff, or paid the debts of Burke & Kellogg. At the time of the sale of the mantels and the abandonment of the business as aforesaid, the plaintiff was absent in Chicago, but immediately upon his return, on the 21st day of October, 1870, he commenced this suit.

The defendants offered to prove that at the time said written contract was executed by the defendants, but before it was signed, it was understood and agreed between the plaintiff and defendants, that the defendants, with the said Burke, should proceed

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Kellogg v. Fox & Minogue.

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with the business, and make sales of the property embraced in said sale from the plaintiff to the defendants. To the admission of this evidence, the plaintiff objected; but the objection was overruled, and the evidence admitted; to which the plaintiff excepted. From the evidence so received, it appeared that at the time the written contract was made, it was understood and agreed between the plaintiff and defendants, that they, with Burke, should proceed with the business, and apply the avails to the payment of the debts and performance of the undertakings of the defendants, as set forth in said agreement; that the property in suit was sold by Burke and the defendants in the usual course of business, for \$144 in money, and Stewart's note for \$155; that the defendants, at the time of said sale, had no intention of appropriating the avails of the sale in any way contrary to the agreement with the plaintiff, but that they soon after appropriated the money and note aforesaid, in violation of said agreement. The value of the property at the time it was sold by the defendants, was \$599. Upon the foregoing facts, the court rendered judgment for the defendants. Exceptions by the plaintiff.

*Edgerton & Nicholson*, for the defendants.

1. The reservation of the right of property to the plaintiff in the bill of sale, should be so construed as to give force and operation to the whole instrument if possible. The plaintiff sold to the defendants his interest, not only in the property described in the schedule, but, also, "*all his interest in the business.*" This "interest in the business" necessarily involved the right of sale of property then on hand, and in course of manufacture; and without this right, one of the leading objects of the transfer would become utterly inoperative, and the "business," a failure. The parties could not have intended such a result.

But, if the reservation in the bill of sale is so far inconsistent with the other provisions of the instrument that the whole cannot stand, then, we insist that the contract involves such an ambiguity as to admit of extrinsic evidence to explain it. 2 Phil. Ev. 761; 3 Stark. Ev. 996, 1020, 1029, and note; *Peish v. Dickson*, 1 Mason, 11; *Wills v. Barrister*, 36 Vt. 220.

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Kellogg v. Fox & Minogue.

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2. Prior to the sale to defendants, the plaintiff and Burke were copartners, and in that right they held and owned the property, and carried on the business. This right was not an exclusive right in either of the parties to any specific portion of the property, but only to *an undivided interest in the surplus*, after all the partnership liabilities should be cancelled. *Washburn et al. v. Bank of Bellows Falls et al.* 19 Vt. 278; *Bardwell v. Perry et al.* 19 Vt. 292.

The plaintiff claims that the reservation in the bill of sale was of the *specific property* included in the schedule, while the defendants insist that the reservation could not have been intended to cover the specific property itself, but only the *plaintiff's interest in the surplus*, after the debts should be paid. If the bill of sale is fairly susceptible of this double meaning, or if it be uncertain from the instrument itself, which meaning the parties themselves attached to it, parol evidence is admissible to explain the circumstances under which they entered into it, and their own contemporaneous exposition of it. *Lawrence v. Dole*, 11 Vt. 549; *Lowry v. Adams*, 22 Vt. 160.

3. The admission of the evidence objected to was not in conflict with the rule which excludes oral evidence to contradict, alter, or vary a written instrument. 3 Stark. Ev. 1046; *Winn v. Chamberlain*, 32 Vt. 318; *Perkins v. Adams*, 80 Vt. 280; *Allen v. Spafford*, 42 Vt. 116.

4. The sale to defendants of the plaintiff's interest in the business and property, did not deprive Burke of his right to proceed with the business precisely as he had done before. This right was that of a *copartner*, and involved a general authority to make sales in the ordinary course of business, of any of the "man-tels or other slate goods" belonging to the firm.

The sales complained of, were made "by said Burke and the defendants in the usual course of business," and in so doing, Burke acted under an authority that neither the defendants nor the plaintiff himself had a right to question.

The action of trover cannot be maintained against the defendants for *participating* in acts of sale that Burke had a right to make, independent of their consent or concurrence.



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Kellogg v. Fox & Minogue.

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*H. G. Wood and W. C. Duntton, for the plaintiff.\**

The opinion of the court was delivered by

PECK, J. When the plaintiff sold his interest in the property and business of the copartnership of himself and Burke to the defendants, Burke still retaining his interest in the business, the stipulation in that contract of sale, that the property thereby sold should remain the property of the plaintiff till the balance of the price was paid, the reservation of ownership, was only of the plaintiff's interest therein as former partner with Burke. By the transaction the plaintiff ceased to be a partner, and the defendants became partners with Burke; and these three thereupon took possession of the property and entered upon the prosecution of the business as partners, under the name of Burke, Fox & Co. It appears that while the defendants and Burke were thus carrying on the business, they sold some of the same slate mantels which were embraced in the sale of plaintiff to the defendants, the defendants not having paid the plaintiff the balance of the purchase. For this sale this action of trover is brought. By the sale of the plaintiff of his interest to the defendants, with the reservation as to ownership till the payment of the price, the plaintiff had no more interest in, or power over the property, and Burke no less, than he would have had, had his copartnership with Burke terminated without any sale by the plaintiff of his interest. In such case either partner has the right to sell the copartnership property. It has been repeatedly decided in this state that, as a general rule, one tenant in common of personal property, is not liable in an action of trover at the suit of his cotenant for selling the common property; although it has been held otherwise, under some circumstances, in some of the states. But as between copartners, after the dissolution of the copartnership, it is clear that each has the power of sale of the copartnership property in the usual course of business, especially property of the character of that involved in this case, procured or manufactured by the copartners for the purpose of sale in the line of their business. The case states that the defendants, by and with

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\* The plaintiff's brief was not furnished the reporter.

the consent and concurrence of said Burke, sold the mantels in question ; and it is again stated that "the property in suit was sold by Burke and the defendants in the usual course of business." Burke could not be made liable to the plaintiff in an action of trover for this sale ; nor can the defendants be thus held liable for their participation with Burke in doing an act which Burke, as between him and the plaintiff, had a right to do, especially as it is found by the county court, "that the defendants, at the time of said sale, had no intention of appropriating the avails of the sale in any way contrary to the agreement with the plaintiff," although they did soon after appropriate the avails to their own use, in violation (as the county court says) of their agreement, and never paid to the plaintiff the balance of the purchase price, as the county court find. The action of trover cannot be maintained in this case, consistently with legal principles applicable to this form of action.

We have no occasion to decide whether the evidence as to the verbal agreement made at the time of the execution of the written contract, introduced by the defendant, was properly received or not ; as the ground of our decision is independent of that, and in no way aided by it. In affirming the judgment, the court is not to be understood as affirming the ruling of the county court in admitting that evidence, or as deciding that question.

Judgment affirmed.



#### THE TOWN OF MOUNT HOLLY v. CYRUS BUSWELL.

##### *Ratification by Town of Contract with Selectmen. Highway.*

The plaintiff's selectmen laid out a highway, mostly upon the defendant's land, and principally for his benefit, and agreed with him that he should waive land damages, build the road, and keep it in repair while he lived where he then did, and that the town should remit all taxes assessed against him for the purpose of repairing highways, so long as he kept said road in repair as aforesaid. The defendant performed his part of said agreement, and kept said road in repair twelve years. The plaintiff recognized said agreement, and received the benefit of the defendant's performance thereof. *Held*, that the plaintiff thereby became bound by said agreement, whether the selectmen had authority to make it in the first instance, or not.

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Mount Holly v. Buswell.

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**ASSUMPSIT.** The case was referred, and the referee reported the following facts:

In December, 1857, the selectmen of the plaintiff town laid out a highway leading from the dwelling-house of the defendant, mainly across the defendant's land, to a main highway then in use. The highway so laid was two hundred and twenty rods in length, and was laid principally for the benefit of the defendant and the farm on which he resided, and at the time said highway was laid, it was agreed between the selectmen and the defendant that, if the selectmen laid out said highway, the defendant should claim of said town no land-damage for its crossing his land, and should build the road himself, without cost to the town, and keep the same in repair while he lived on the farm where he then resided, and still resides, and that all taxes raised by said town and assessed upon the grand list of the defendant for the purpose of repairing highways in said town, were to be remitted to him while he kept said highway in repair. The surveyor who made the survey of said highway, was employed by the selectmen to make their report for record, and it was mutually understood by both parties, if the surveyor considered it proper, that the contract with the defendant should be embraced in the report of the survey; but said survey, as recorded, contained the contract only so far as is shown by the following clause: "Said town allowing said Buswell to work his own highway-tax on said surveyed highway." The contract was not otherwise reduced to writing. At the time of entering into said contract, by the provisions of the statute then in force, highway-taxes raised for the purpose of repairing roads, were payable in labor, and were expended in the several highway districts; and the change in the statute giving the towns the right to vote that the highway-taxes should be paid in money, was not at the time contemplated, provided for, or guarded against, by the parties to the contract.

The contingency of extraordinary damage to the highways, resulting from freshets or floods, whereby it might become necessary for the town to raise a money-tax to repair their highways, or some portion of them, and to assess the inhabitants of the town for that purpose, was not made a subject of consideration in making said contract, or spoken of by the parties.

In the year 1866, the plaintiff town voted that the highway tax should be collected in money, and the defendant was assessed with the rest of the inhabitants of said town, and, upon request of the defendant, the selectmen of the town remitted his tax to him, by giving him an order for the amount; and in the other

and intervening years, from the time of the completion of said highway till the bringing of this suit, the defendant had formed a highway district by himself, and worked out his own highway tax on said highway. No remittance was ever made to the defendant, or claimed by him, for money-taxes raised for the purpose of building new roads; but in all cases after the making of said contract, the expenses of building new roads had gone into the current expenses of the town, and formed a portion of the annual town tax.

In the year 1869, in consequence of an extraordinary flood, the highways of said town were badly washed and injured, and said town, by vote at a meeting, about the legality of which no question was made, raised one hundred and seventy-five cents on a dollar on the grand list, for the purpose of repairing the highways; and the grand list of the defendant for that year, was \$48.40, and the tax assessed against him under said vote was \$84.70. The money thus raised was, by the selectmen of said town, laid out and expended in repairing highways most injured by the flood—the highway in question being injured thereby only to the extent of twelve dollars, and was repaired by the defendant.

The defendant paid his portion of said tax with an order given him for that purpose by the then selectmen of the town, which order was obtained by the defendant by his stating to the selectmen that he had a contract with the town, on record, which gave him a right to such an order, and the selectmen, without examining the record, gave the defendant said order, upon his agreeing if it was not right that he should receive such order, he would make it right; by which the referee finds the parties to mean, that if the defendant had no legal right to such order under his contract with the town, he would refund the amount to the treasury of the town. The selectmen gave said order, relying upon the promise of the defendant to refund the same, or to pay to the town the amount of his tax, provided he had no legal right under the contract to have an order from the town to pay his tax as aforesaid. At the time the order was obtained from the selectmen, the defendant represented to them that he was, by the terms of a contract then on record in the town clerk's office in said town, entitled to all taxes raised for highway purposes, both for old and new roads, and that, if the order was given him by the selectmen as requested, if he had not a right to it, he would make it right; and it appeared from the evidence that the contract was not in its terms put on record, as the defendant supposed it was.

The plaintiff sought to recover the amount of said order, relying upon the express promise of the defendant to refund, if he

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Mount Holly v. Buswell.

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had no legal right to the same, and claiming that the contract of the defendant with the town gave him no right thereto.

The referee found for the plaintiff to recover the amount of said order, if the court should be of opinion that the defendant was not entitled to have said tax remitted to him; otherwise, for the defendant to recover his costs.

The court, at the September term, 1872, WHEELER, J., presiding, rendered judgment on the report for the plaintiff. Exceptions by the defendant.

*Walker & Goddard*, for the defendant.

The question submitted by the referee is the legal rights of the parties under his finding as to what the parties agreed upon.

Both the statute then in force, and the Gen. Stat., impose upon the selectmen the duty to lay out, alter, and discontinue highways, as the public good shall require. No other restriction is placed upon them. They are the sole judges as to what contracts are best for the town; no vote of the town can restrain them. Gen. Stat. ch. 24.

By section 14 of said chapter, it is made the corporate duty of the several towns to build and keep in repair the highways within such towns, and the discharge of this important duty rests upon the selectmen. The selectmen, in this case, undertook to discharge that duty by their contract with the defendant, and made a very advantageous contract for the town. There is certainly ample consideration for the town's promise to allow the defendant his highway taxes. The statute does not limit the selectmen to any particular mode of contracting. If this road had been damaged hundreds of dollars in 1869, or any other year of the defendant's residence there, he was held by his contract to repair it; and it appears from the case that the town still insists that he shall keep the contract on his part.

This was an extra highway tax. By the present statute, such a tax may be raised, payable in money or work. In 1857, the referee finds, it could only have been raised in work; if payable in work, the defendant, being from June, 1857, to the time of bringing this suit, the surveyor of a district covering just this road, and the only person on his tax-bill, would have been en-

titled to have allowed himself for the repairs that season, and credited himself with his own work before, and to have thereby satisfied the tax in accordance with his contract with the town. The town cannot annul their contract with the defendant by raising this tax payable in money; the legal rights of the parties are the same, whichever way a tax is raised.

This contract has been fully ratified by the town for twelve years; this being the case, they cannot now avoid their contract, even if there was originally an assumption of power on the part of the selectmen. *Burlington v. New Haven & Northampton Co.* 26 Conn. 56.

The doctrine is well established, that the principal cannot repudiate the contract of his agent, on the ground of his having no authority to so contract, and at the same time avail himself of the advantages and profits of the agent's contract.

*C. H. Joyce*, for the plaintiff.

The referee finds that the contract between the defendant and selectmen was, that all the taxes raised for the purpose of repairing highways were to be remitted to him. The question is, what taxes were intended by this contract? The plaintiff claims that it embraced only those raised by the town annually, under the statute. When the contract was entered into, highway taxes were required to be paid in labor; and the referee finds that at the time of said contract no change in the law was contemplated. He also finds that the subject of floods was not spoken of or considered. From the terms of the contract, and what we learn as to the understanding and intentions of the parties from the situation and circumstances in which they were placed at the time it was entered into, the conclusion seems to be irresistible, that the parties intended just what the plaintiff now claims, and that it was not expected or understood to include such a tax as was raised in 1869. The fact that the defendant received an order for his tax in 1866, has no tendency to show that the plaintiff's construction of the contract is erroneous, because that was for his annual highway tax, and nothing more.

The road was built almost solely for defendant's benefit, and down to 1869, he had always worked out his annual highway tax on it. But in 1869, the first time it became necessary to raise money to repair damage done by floods, this controversy arose, the plaintiff claiming that the contract did not apply to such a contingency. It cannot be said that the plaintiff has acquiesced in the defendant's construction of this contract, because the plaintiff's conduct, as found by the referee, tends directly to the opposite conclusion.

But whatever the verbal contract or understanding between the parties may have been, we insist that it was attempted to reduce it to writing, and that paper must govern. The case shows that it was mutually understood by the parties that the contract was to be embraced in the report of the selectmen, if the surveyor thought it proper. The referee finds that a portion of it was put into the report, and a part left out, but does not find that the surveyor thought it improper to include it all. The surveyor was the agent of both parties to put the contract in writing; he put in a part, and probably the whole of it, as he and the parties *then* understood it, and gives us no reason why he left out any part, and does not in fact say he did. It is so well settled as to need no citation of authorities, that if any part of a contract is reduced to writing, the whole must be, and that the writing must govern; parol proof cannot be received to add to or detract from it.

From the terms of this contract, no one can doubt that it speaks just what the parties then understood. The referee has detailed the evidence upon which he has found the contract as reported by him, so that the question can be raised here, and the plaintiff did not need to object to the parol evidence when it was introduced before the referee. There is another fact worthy of notice as bearing upon the question of the intention of the parties and the construction of the contract, and that is, the fact that the defendant had a large grand list, and that it would cost but a small sum annually to repair that piece of road.

The plaintiff, in his declaration, claims to recover of the defendant the amount of that order, on the ground of false representations made to the selectmen. The referee finds that when

the defendant obtained the order, he told the selectmen that by the terms of a contract on record in the town clerk's office, he was entitled to all taxes raised for highway purposes, both for *old* and *new* roads, and that if they would give him the order, if it was not right, he would make it right. When the selectmen came to see the record, they found it was not as the defendant had represented, and the referee finds that it was not what the defendant supposed it was. The selectmen gave him the order, relying upon what he told them in regard to the contract on record, and the defendant said nothing about any other. It turned out, in fact, that there was no such record, and so of course the defendant's representations were false, and the defendant must be held to pay back the amount of the order as he agreed. And again, the defendant having represented that the terms of the recorded contract embraced all taxes raised for *old* and *new* roads, and the referee having found that the contract, as reported by him, did not embrace money raised for new roads, then if parol evidence could come in to patch up the contract, the plaintiff would be entitled to recover on this branch of the case under his special counts, because the contract the defendant represented to the selectmen, had no existence in writing, or parol either, and so his representation was false.

If the plaintiff's theory as to the construction of this contract is the true one, then there can be no question as to the plaintiff's right to recover in this action, as the referee finds that what the defendant meant by doing what was right, was, to pay back the amount of the order to the town. But whatever the court may think in regard to the construction of this contract, the plaintiff claims it was wholly void, for the reason that the selectmen had no power or authority to enter into it.

It has been held that selectmen could not discharge the interest of a witness. *Angel v. Pownal*, 3 Vt. 461; *Yuran v. Randolph*, 6 Vt. 369. Nor receive money from a sheriff collected for the town, and give him a valid discharge. *Middlebury et als. v. Rood*, 7 Vt. 125. They have no power to submit any claim against the town to arbitration, except such as they are authorized under the statute to audit and adjust themselves. *Dix v. Dummerston*, 19



Vt. 262; *Hollister v. Pawlet*, 43 Vt. 425. The powers of selectmen are given and limited by statute. *Dalrymple v. Whitingham*, 26 Vt. 345. The statute giving selectmen a certain jurisdiction over the subject of highway, does not authorize them to enter into the contract set forth in this case; it would not authorize them to dispose of the money raised for highway purposes, only as provided by law.

The opinion of the court was delivered by

Ross, J. The referee has found that in 1857, the selectmen of the plaintiff laid out a road, two hundred and twenty rods in length, mostly on the defendant's land, and for his benefit, under an agreement between them and the defendant, that the defendant should charge no land-damages, build the road, and keep it in repair so long as he lived on the farm where he then resided, and that all taxes raised by the town and assessed upon the grand list of the defendant for the purpose of *repairing highways* in the town, should be remitted to the defendant, so long as he continued to keep the road thus laid in repair. The report shows that the defendant has always performed his part of this agreement, and that the town, up to the great freshet of 1869, fulfilled its part of this agreement, and remitted to the defendant, in one way and another, all the taxes assessed against him for the purpose of repairing highways.

After the freshet of 1869, the defendant put the highway so laid out in repair, at an expense of about \$12. The town assessed for repairing the highways in the town against the defendant, a tax of \$84.70. The selectmen remitted this tax to the defendant by giving him an order on the town treasurer, on his representing he had such an agreement with the town, and that it was on record, and on his promise to refund if it was not so. The agreement turns out not to be fully on record, and this suit is brought to recover back the sum thus remitted. The plaintiff has argued its right of recovery mainly upon the ground of want of authority in the selectmen to make such an agreement on behalf of the town. If the agreement had not been recognized by the town in various ways, and if the town had not re-

ceived the full benefit of the agreement by the defendant's waiving his land-damages, building the road, and repairing it for twelve years, it might be an open question whether the selectmen, by virtue of their office, had the right to make such an agreement.

We think, after the action of the town in recognition of that agreement, as found by the referee, and after it has received the benefit of the agreement on its part, it is no longer an open question, and that the town is as much bound by it as it would be if it had specially authorized its selectmen by a vote in a meeting duly warned to enter into such a contract with the defendant. The tax sought to be recovered by the town, falls exactly within the class of taxes which were to be remitted by the agreement, as found by the referee, and the defendant rightfully obtained an order from the selectmen for 1869, remitting said tax, although he procured the order by stating, innocently, that the agreement was on record, when it was not fully on record. The defendant honestly believed it was fully recorded.

The judgment of the county court is reversed, and judgment on the report that the defendant recover his costs.

### GEORGE W. PARMENTER v. CHESTER KINGSLEY.\*

#### *Compromise. Consideration.*

P. and K. dissolved partnership, K. taking the partnership property and giving P. a note for \$938, and agreeing to pay all partnership liabilities. K. subsequently failed, without having paid partnership debts to the amount of \$1500, and informed P. that he could not pay them, and that P. must pay them. Finally, upon K.'s proposal, P. agreed to pay K. \$700, upon being indemnified by certain persons named, against all said partnership debts, which indemnity was given, whereupon P. surrendered said note, and K. paid P. the balance, after deducting \$700, and P. discharged the mortgage given to secure the same. *Held*, that the indemnity was a sufficient consideration for the compromise, and that P. was not entitled to recover said \$700 on said note, the transaction being free from fraud on the part of K.

**ASSUMPSIT**, in special and general counts. The case was referred to referees, who reported as follows :

\*This case was tried at January term, 1868.

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Parmenter v. Kingsley.

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"The plaintiff and defendant, about the first day of March, 1855, entered into a contract of copartnership to carry on a business of manufacturing cloth and woolen goods, at Salisbury, Vt., where the defendant resided, and had hired a factory and machinery. The plaintiff resided at Brandon. This contract was verbal, and the particular terms thereof did not appear, further than it was stipulated and agreed by the parties that no debts should be made against the company without the consent of both parties. Under this contract, they, as partners, commenced and carried on said business, at said factory, until the 10th day of October, 1855, when, by mutual consent, the copartnership was dissolved.

"During the continuance of this partnership, the plaintiff had, from time to time, put money into the business, while the defendant had, principally, the management of the business at the factory; and in the course of the business, partnership debts had been contracted by the defendant, without the consent of the plaintiff, but to what amount, the partners did not then definitely ascertain, nor did it appear to the referees; but at the time of the dissolution the defendant knew, or had the means of knowing, the amount of the partnership debts, as all had been contracted either by him, or with his knowledge and consent.

"At the time of the dissolution, the plaintiff and defendant settled, and agreed and adjusted between themselves all of said partnership business; the plaintiff conveying and releasing to the defendant all his title and interest in the goods, stock, material, property, and business of the partnership; and the defendant, on his part, agreeing to pay the plaintiff the sum of nine hundred and thirty-eight dollars, for which he then executed and delivered to the plaintiff his promissory note, dated the 10th of October, 1855, payable to the plaintiff, or bearer, on demand, and at the same time executed a mortgage, amply securing said note; and the defendant also made an agreement with the plaintiff that he would pay and satisfy all company liabilities of every name and nature, which agreement was in writing, in the words and figures following:

"Know all men by these presents, that the late firm of Kingsley & Parmenter is hereby dissolved by mutual consent and agreement. All company liabilities of every name or nature, are to be paid and satisfied by the said Kingsley. Brandon, October 10, 1855. It is further agreed that said Parmenter has no claim upon said Kingsley for past services.

(Signed,)

CHESTER KINGSLEY,  
G. W. PARMENTER.

" At the time of this dissolution, no inventory of stock, goods, or other company property, was taken by the partners, but it appeared before the referees that at that time there was cloth manufactured and in process of manufacture and stock on hand, sufficient to make, in all, some ten or twelve thousand yards, valued at from fifty to sixty cents a yard, and there was no evidence that at this time the company assets and property were insufficient to pay and discharge the debts and liabilities of the company, or that there was any thing in the condition of the business that made the settlement and adjustment which the partners then made, in any respect inequitable, unequal, or to the advantage of one over the other.

" On the termination of the partnership, the defendant continued the business in his own name and on his own account, until the 10th day of March, 1856.

" At this time, the copartnership debts not having been paid, the defendant, being individually indebted to quite a large amount, found that, on account of debts and liabilities against him, his failure was inevitable, and a further continuance of the business impossible; and he, therefore, took measures to bring on the event, which could not be much longer delayed, and, accordingly, on Saturday, the 8th of March, 1856, the defendant went to Rutland and took legal advice, and either by confession of judgment, or by writs of attachment (or in some mode not clearly made to appear to the referees), caused process to be issued against himself, in favor of Wesley Morrill, Hiram Blackmer, and Dennison Blackmer, who were his brothers-in-law.

" As early as possible on Monday morning, the 10th day of March, 1856, the entire property of the defendant was taken from his possession—the largest portion of it by an officer, by virtue of the process which had been issued in favor of the said Morrill and Blackmers. The property which was thus taken by the officer, consisting mostly of the cloth manufactured and in process of manufacture, was, afterwards, on the 26th day of March, 1856, sold on executions at auction, and purchased by said Morrill and Blackmers for \$1,771.50.

" At the time of the attachments, or on the Sunday and Sunday night previous, some machinery and other cloth were, by the defendant, put into the possession of Morrill & Blackmer and Dennison Blackmer, and such measures were taken by them, and in a secret manner, as effectually to put such property out of reach of attachment by the defendant's creditors. The value of the property thus disposed of without legal process, did not appear before the referees only by general estimate, and according to that, amounted

to some ten or twelve hundred dollars. In addition and concurrently with these proceedings, the defendant made an assignment in writing to his brother Harry Kingsley, of such accounts and demands owing to the defendant, and other assets, as he then had; and from this assignment only some forty or fifty dollars were collected by the assignee.

"The defendant brought about this attachment and disposal of all his attachable property, and took pains to do so without its coming to the knowledge of the plaintiff, or other creditors of the defendant; but, although the transaction was attended with suspicious circumstances, and notwithstanding the evidence did not sufficiently show the amount and value of the property thus disposed of, nor the amount of the debts and liabilities of the defendant, which were in the end paid thereby, yet the referees find, that the avails of the property received from the sale of the property on the executions on the 26th of March, 1856, and the other property put into the hands of Morrill and Blackmer by the defendant, were ultimately applied to the payment of the debts of the firm of Parmenter & Kingsley, and the individual debts of the defendant. And the referees also find that whatever amount Morrill and Blackmer, or either of them, paid in discharge of the said company's debts, or the individual debts of the defendant, or paid for the defendant, as hereinafter stated, has been fully reimbursed to them by the defendant, either out of the property received by them as above stated, or otherwise.

"Soon after the defendant's failure, the plaintiff learned that several of the partnership debts, which the defendant was bound to pay, were still unpaid, and applied to the defendant to ascertain the amount of debts still outstanding against the firm, and requested the defendant to pay them. The defendant did not fully, or satisfactorily to the plaintiff, inform him of the amount of outstanding debts, but the plaintiff learned there were debts against the company still unpaid to the amount of about fifteen hundred dollars; and the defendant told the plaintiff that he could not pay these debts, or any part of them, and that the plaintiff must pay them himself.

"The plaintiff at different times applied to the defendant on the subject of these debts, and for the purpose of inducing him to pay them; and at some time prior to September 11th, 1856, the defendant proposed to the plaintiff, if he would pay him the sum of seven hundred dollars, to procure for the plaintiff the indemnity of Morrill & Blackmer against the partnership debts still remaining unpaid. Afterwards, the plaintiff made the agreement with the defendant that for such an indemnity, to be executed by Wes-

ley Morrill, Hiram Blackmer, and Dennison Blackmer, he would pay the defendant the sum of seven hundred dollars; and in pursuance of this agreement, the said Wesley Morrill, Hiram Blackmer, and Dennison Blackmer, executed and delivered to the plaintiff a written contract of indemnity, dated the 11th day of September, 1856. At the time of the delivery of this indemnity to the plaintiff, and at the request of the defendant, the plaintiff delivered to the said Wesley Morrill the said nine hundred and thirty-eight dollar note, which he held against the defendant, and received from him, on said note, at that time or subsequently, only the amount due on said note, after deducting the sum of seven hundred dollars, which was remitted or discounted by the plaintiff, for the benefit of the defendant, and in pursuance of the agreement to pay him that sum for the indemnity so delivered to the plaintiff; and at the same time, at the request of the defendant and Morrill and Blackmer, the plaintiff discharged on the record the mortgage which the defendant had executed to secure said note.

"Whatever partnership debts remained unpaid at this time, were subsequently paid and discharged, but in what particular manner did not further appear than is heretofore stated; and the plaintiff was released from any further liability on account thereof.

"Under the above state of facts, the plaintiff claims and seeks to recover in this suit the sum of seven hundred dollars, and the interest thereon from the 11th of September, 1856, on the ground that at that date the defendant was indebted to him in that sum, which he has never paid to the plaintiff, or been legally discharged or released from paying.

"And the referees find and report that, if the foregoing facts do not release and discharge the defendant from the payment of said sum of seven hundred dollars—being the portion of said note which was unpaid by him as aforesaid—then the referees find that the plaintiff is entitled to recover the said sum of seven hundred dollars and interest thereon from the 11th day of September, 1856, to the time of judgment in this suit.

"But if from the foregoing facts the court decide that the defendant is legally released and discharged from the payment of said sum, then the referees find that the defendant is entitled to recover his costs."

At the September term, 1867, the court, AINSWORTH, Assistant J., presiding, decided, *pro forma*, that the referees' report be accepted, and that the plaintiff recover of the defendant, upon said report, the said seven hundred dollars allowed conditionally by

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Parmenter v. Kingsley.

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said referees to the plaintiff, and interest thereon from the 11th day of September, 1856; to which decision of the court, as to said seven hundred dollars and interest, the defendant excepted.

*Edwin Edgerton and E. J. Phelps*, for the defendant.

*Briggs & Nicholson*, for the plaintiff.

The opinion of the court was delivered by

WILSON, J. The referees do not find, nor do the facts reported by them show, that the defendant procured the surrender of the note by fraud. It is undoubtedly true that, at the time of the dissolution of the partnership, October 10, 1855, the company assets were sufficient to pay the company liabilities. The defendant continued the business in his own name and on his own account, from the time of the dissolution of the partnership until the 10th of March, 1856, but the amount of his indebtedness at the time of his failure, does not appear. On the 10th of March, 1856, the company debts had not been paid. The defendant, at that time, was indebted to a large amount, besides the company debts; he found his failure was inevitable, and caused process to be issued against himself, in favor of Morrill and Blackmers, and his entire property was taken from his possession, the largest portion of it by the process in favor of Morrill and Blackmers, and the remainder of it by his assignment to them. The plaintiff, soon after the failure of the defendant, ascertained that several of the company debts against Parmenter & Kingsley were still unpaid, and he requested the defendant to pay them. The defendant then told the plaintiff that "he, the defendant, could not pay these debts, and that the plaintiff must pay them himself." It is claimed by the plaintiff that the defendant's statement, that he could not pay the company debts, was false; but the report of the referees furnishes no evidence of any misrepresentation by the defendant as to his ability or inability to pay those debts. He said he could not pay them, and there is no evidence in the case that he could pay them at that time. The fact that the defendant, with the aid derived from the compromise with the plaintiff, did,

at a later period, pay all his debts, does not prove that his statement to the plaintiff was false. It appears that the avails of all the defendant's property which went into the hands of Morrill and Blackmer, were ultimately applied to the payment of the debts against the firm of Parmenter & Kingsley and the individual indebtedness of the defendant. The referees do not find any intent to defraud the plaintiff, or any other person. It does not appear but that it took every dollar of the defendant's property, including the \$700 realized from the indemnity of Morrill and Blackmers, to pay his debts.

2. It is insisted by the plaintiff that the giving up of the note was wholly without consideration, and that the note, to the amount of \$700, with interest from the date of the surrender, still remains a subsisting obligation against the defendant. It appears that the plaintiff held a note against the defendant for \$938, and the defendant's agreement to pay the company debts. The company debts, at the time the indemnity was executed, were about \$1500, for the payment of which by the defendant, the plaintiff had no security except the defendant's promise to pay them. The plaintiff could not compel the defendant to procure from a third person an indemnity to the plaintiff against the payment of those debts. But it appears that the defendant proposed to the plaintiff, if he would pay the defendant \$700, the defendant would procure for the plaintiff the indemnity of Morrill and the Blackmers, indemnifying the plaintiff against the partnership debts then remaining unpaid. This proposition was accepted by the plaintiff. He paid the \$700, received the indemnity in pursuance of the agreement, the balance of the note of \$938 was paid to the plaintiff, and he surrendered the note to be cancelled. The security or additional security furnished the plaintiff for the payment of those debts, was a sufficient consideration for the compromise. Suppose the defendant at the time of his failure had not been indebted to the plaintiff, and the only subsisting obligation between them to have been the defendant's agreement to pay the company debts, and the plaintiff had paid the defendant \$700 to be indemnified against those debts, it would hardly be claimed that the plaintiff could recover back the sum paid for the



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indemnity, unless it was obtained by fraud, of which there is no evidence in the case. The circumstance that the \$700 was paid to the defendant by deducting that sum from the amount of his note to the plaintiff, does not vary the legal effect of the transaction; it stands precisely as if the money had been paid over to the defendant, and the plaintiff had been paid in full the note he held against the defendant.

The judgment of the county court is reversed, and judgment for the defendant to recover his costs.



### MARTIN WRIGHT v. WARREN VAUGHN.

#### *Conditional Sale. Change of Possession.*

If one sell and deliver property to another, absolutely, and the parties subsequently make it a conditional sale, a change of possession is necessary, to protect the property from attachment by the creditors of the vendee.

TRESPASS for a wagon. The case was referred, and the referee reported the following facts:

The defendant purchased the wagon of one Ballou, who bid it off at sheriff's sale on an execution in favor of *Taylor v. Bolster*, December 9, 1869. About the first of April, 1868, one Ainsworth contracted to sell said Bolster a farm, and some personal property thereon, among which was the wagon in question, for all which Bolster gave his note. Bolster took possession of the farm and property under said contract. After Bolster went into possession, Ainsworth executed a deed to him; but he would not accept it, as he claimed it was not according to the contract. On the 24th of June, 1868, Ainsworth executed another deed to Bolster, and put it on record, without submitting it to Bolster, or having any understanding with him as to whether it was according to the contract. Bolster claimed that he never accepted said last named deed; but the referee found that, by his acquiescence and acts, he had become bound thereby. The sale of said personal property by Ainsworth to Bolster, was originally absolute and unconditional; but Ainsworth inserted in said last named

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deed, without authority from Bolster, that said property was to be holden till said note was paid ; which the referee found was done to prevent the property from being attached. Some time after the said 24th day of June, Ainsworth sold and transferred said note to the defendant, by virtue of which, the defendant took and claimed title to said wagon. The referee found for the plaintiff to recover the value of the wagon.

The court, at the March term, 1872, WHEELER, J., presiding, rendered judgment on the report for the plaintiff. Exceptions by the defendant.

*Bromley, Clark, and J. Prout*, for the defendant, cited *Rothchild v. Rowe*, 44 Vt. 389, as to the transfer of the note carrying title to the wagon.

*Harvey Button*, for the plaintiff.

The opinion of the court was delivered by

PECK, J. The referee having found that at the time the trade was made between Ainsworth and Bolster, there was no lien to be reserved to Ainsworth on the personal property, of which the wagon in question is part, but that it was then sold and delivered absolutely to Bolster, which was about April 1, 1868, we must regard this finding of the fact as conclusive. No attempt was made to create any lien or condition in favor of Ainsworth upon the personal property till June 24th of the same year, when Ainsworth executed and caused to be recorded the deed of the farm to Bolster, without the knowledge of Bolster, and without submitting the deed to him, or having any understanding with him whether it was according to the contract ; and without any agreement with Bolster to that effect, inserted in the deed the condition as to the personal property, without any authority from Bolster. Whether the implied acceptance of the deed by Bolster by his continuing to occupy the premises under it, as found by the referee, bound him by the provision therein as to the personal property, so as to convert the absolute sale into a conditional one, dependent upon the payment of the note, as between Ainsworth and Bolster, is not necessary to decide. Whatever

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Wright v. Vaughn.

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might be the effect of that provision in the deed, as between vendor and vendee, the property in question having gone into the possession of Bolster by delivery under an absolute sale to him, it thereby became attachable as the property of Bolster; and a subsequent stipulation creating a lien upon it, or attaching a condition to the sale, in favor of Ainsworth, unaccompanied by any change of possession, would not protect the property from such attachment. Therefore, the levy of the execution in favor of Taylor against Bolster, Dec. 9, 1869, upon the wagon, was legal; and the purchase of it by Ballou at the officer's sale on that execution, and the plaintiff's purchase of it of Ballou, vested the absolute title to the wagon in the plaintiff; and the subsequent taking of it by the defendant from the plaintiff, was a trespass.

This view of the case renders it unnecessary to decide whether the transfer of the note by Ainsworth to the defendant operated to convey to him whatever right Ainsworth had to the wagon under the provision in the deed already mentioned.

Judgment affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF BENNINGTON,  
AT THE  
FEBRUARY TERM, 1878.

PRESENT :

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. ASAHEL PECK,  
HON. HOMER E. ROYCE, } ASSISTANT JUDGES.  
HON. JONATHAN ROSS,

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ROYAL F. WILLIAMS v. SILAS MASON, APPELLANT.

*Justices of the Peace. Appeal.*

In general assumpsit before a justice of the peace, the *ad damnum* in the plaintiff's writ, and the sum demanded by the declaration, was ten dollars. The debit side of the plaintiff's specification on trial, was \$38.82, and the credit side, \$32.16; leaving a balance of \$6.66; for which sum, with eighty cents interest thereon, the plaintiff obtained judgment. *Held*, that the action was appealable.

GENERAL ASSUMPSIT. The *ad damnum* in the plaintiff's writ, and the sum demanded by the declaration, was ten dollars. The debit side of the plaintiff's specification on trial, was for wood and butter, \$38.82; and the defendant was therein credited, "By his ac't, \$32.16"; leaving a balance of \$6.66; for which sum, with eighty cents interest thereon, the plaintiff obtained judg-

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Williams v. Mason.

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ment, and the defendant appealed. In the county court, the plaintiff moved to dismiss said appeal, for want of appellate jurisdiction in said court; and the court, WHEELER, J., presiding, *pro forma*, sustained the motion and dismissed the appeal; to which the defendant excepted.

*T. Sibley*, for the defendant.

Only one question is presented to the court in this case. Did the specification and exhibits on the trial before the justice, bring the case within the exception of § 70, ch. 31, of the Gen. Stat., taking away, or restricting, the right of appeal? Was the debit side of the plaintiff's book or the extent of his claim an exhibit, within the meaning of the statute? *Warren v. Newfane*, 25 Vt. 250; *Conn. & Pass. Rivers R. R. Co. v. Bates*, 82 Vt. 420.

*J. W. Carpenter*, for the plaintiff.

The plaintiff claims that this case comes within the true intent and meaning of the third provision of the seventieth section of the thirty-first chapter of the General Statutes.

There is no pretense, or claim, that this case is appealable, or that the county court has appellate jurisdiction of it, unless it is made so by the plaintiff's specification which is filed with the copy of the record. The only question is, does the specification exceed ten dollars? The plaintiff insists that it does not, and that there is no error in the ruling of the county court. *Stephens v. Howe*, 6 Vt. 572; *Boardman v. Harrington*, 9 Vt. 151; *Weston v. Marsh*, 12 Vt. 420; *Cooper v. Miles*, 16 Vt. 642; *Bank of Rutland v. Cramton*, 28 Vt. 380; *Conn. & Pass. Rivers R. R. Co. v. Bates*, 82 Vt. 420.

To determine whether or not the specification or exhibit exceeds ten dollars, the whole of it must be taken together. It cannot be determined by the debit side alone, or the credit side alone; but both must be taken together, to find the true amount, which is the test of jurisdiction in actions of assumpsit; and in this case there is only \$7.46 balance in favor of the plaintiff. *Miller v. Livingstone*, 37 Vt. 467; *Scott et als. v. McDonough*, 39 Vt. 203.

The opinion of the court was delivered by

ROYCE, J. The only question in this case arises upon the motion to dismiss the appeal for the want of appellate jurisdiction in the county court. The debit side of the plaintiff's specification amounted to \$38.82, and in it he had given the defendant credit, "By his acc't, \$32.16," thus leaving a balance due the plaintiff, as he claimed, of \$6.66, for which sum, with eighty cents interest, he obtained a judgment. The defendant appealed, and upon the copies of appeal being entered in the county court, the plaintiff moved to dismiss the appeal for the want of jurisdiction. The court, *pro forma*, sustained the motion, and dismissed the appeal, and the case comes here upon exceptions to that ruling. If the suit was appealable, it was made so by the specification or exhibit; for neither the sum demanded by the declaration, nor the *ad damnum*, made it appealable. The question as to the finality or conclusiveness of judgments rendered by justices of the peace, has frequently been before this court, and it might at first seem as if there had not been a perfect uniformity in the decisions made upon the question; but I think the decisions can all be reconciled by noticing the distinction which has always been made between the debt, or matter in demand, as affecting the original and final jurisdiction. *Southwick, et als. v. Morrill*, 8 Vt. 320, was an action of debt on a judgment for \$563.50, and on which there was an endorsement of \$533.86. The writ was made returnable to the county court. A motion was made to dismiss, which prevailed, and the court held that the sum actually appearing from the record to be due, determined the question of jurisdiction. The same question was presented in *Stevens v. Howe*, 6 Vt. 572, and the court there held that however large the original debt, if it had been reduced by payments to a sum within the jurisdiction of an inferior court, such court had jurisdiction; and the law as settled by these cases, has been followed in all the subsequent reported cases. But in determining questions involving the *finality* of justices' judgments, a different rule has prevailed. In that class of cases, the court has regarded the amount and character of the demand out of which the indebtedness was claimed to have resulted, rather than the amount which

was claimed, or appeared to be due. In *Church v. Vanduzee*, 4 Vt. 195, the plaintiff brought an action on book before a justice, and laid his *ad damnum* at \$10. His account exhibited in support of his action, amounted to \$10.67, and he recovered judgment for \$10. The defendant appealed, and the plaintiff moved to dismiss, because the action was not appealable. The motion was overruled, and the court say that the same question is presented as if the account exhibited had been \$100. In either case, the defendant might contest the whole account, and the court might be called upon to decide upon each and every item. That the right of appeal cannot be taken away by the plaintiff's demanding \$10 only, as the balance or sum he will be satisfied with, when he presents as a subject of controversy an account of \$100. That the correct rule upon the subject is, that when the action is upon an account or chose in action, the nominal amount must determine both the jurisdiction and the right of appeal. In that case, the plaintiff attempted to make the judgment final by the abandonment of a portion of his claim, and in this, he seeks to accomplish the same purpose by an acknowledgment of payment to apply on his claim.

By the specification or exhibit, is meant the written description, or the written evidence in support of the claim. And where this exceeds \$10, so that the defendant has the right to litigate matters described in it to an amount exceeding \$10, the action is appealable. In this case, the balance claimed by the plaintiff, and for which he recovered his judgment, would necessarily vary as the facts might be found in reference to the items which went to make up his claim. Those facts, the defendant had the right to litigate, and that brings the case within the rule above stated. It was upon this theory of the law, that the case of *Conn. & Pass. Rivers R. R. Co. v. Bates*, 82 Vt. 420, was decided. That was an action of assumpsit to recover an assessment of less than \$10, made upon a subscription of \$100, and the contract was set out in the declaration. The court say that a judgment in that suit involved an adjudication of the validity of the contract, and that it was not the design of the statute to shut down the

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 Winhall v. Landgrove.
 

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parties to the final judgment of a justice in litigating their respective rights and liabilities under such a contract.

The time and space occupied in the consideration of this case, can only be justified by the hope that it may aid in removing the doubts which have hitherto been entertained upon the question involved, and which have led to so much profitless litigation.

Judgment reversed, and cause remanded.

### THE TOWN OF WINHALL v. THE TOWN OF LANDGROVE.

#### *Pauper. Settlement. Service of Warning. Evidence. Removal.*

If a husband, having no settlement in this state, abandon his wife, she is permitted to her settlement before marriage.

An officer's return on a warning against S., and four others, as follows: "Bennington, ss. Landgrove, February 17, 1815. Then served this precept by leaving a true copy of the same in the hands of the within named S. (Signed) D. W., Constable," *held, bad.*

It is not competent to show by extrinsic evidence when a record was made.

Where a husband abandoned his wife, owning an interest, not freehold, in lands which yielded but a small part of what was necessary for her support, it was *held*, that she could become legally chargeable as a pauper, and liable to removal.

**APPEAL** from an order for the removal of Nancy Bates, a pauper, wife of Henry E. Bates, from the town of Winhall to the town of Landgrove. The case was referred, and heard before the referee. The defendant offered in evidence the records of the town of Landgrove, by which it appeared that, on the 11th day of February, 1815, a warning was issued by the proper authority, directing the constable to warn Daniel Swallow, Nancy his wife, Jotham, Polly, and Nancy, children of the said Daniel, to depart said town; that the return of the service of said warning was as follows:

"BENNINGTON, ss. Landgrove, February 17, 1815. Then served this precept by leaving a true copy of the same in the hands of the within named Daniel Swallow.

Fees. 1 mile travel, .06  
Copy, .17

[Signed] DAVID WILEY,  
Constable; "

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 \$0.23



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Winhall v. Landgrove.

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and that said warning and return were, "February 17, rec'd and record'd by Daniel Tuthill, Town Clerk." The plaintiff objected to the admission of said evidence, because it did not thereby appear in what year said warning and return were received and recorded. For the purpose of showing that said record was made on the 17th of February, 1815, the defendant offered in evidence the record of a warning and return recorded next preceding the record aforesaid, issued and served on the same day as the warning first aforesaid, and "Received Feb. 1815. Recorded by Daniel Tuthill, T. Clerk"; also the record of a warning and return recorded next following the record first aforesaid, issued and served on the same day as the others, and "Received Feb'y 1815, and recorded by Daniel Tuthill, T. Clerk;" and proved that said Tuthill was town clerk of Landgrove in January, 1815, and that all of said records were in his handwriting; all which evidence was admitted. The other facts necessary to be stated, sufficiently appear in the opinion of the court.

The court, at the December term, 1871, MILLINGTON, Asst. J., presiding, accepted the report of the referee, and rendered judgment, *pro forma*, that the pauper was duly removed. Exceptions by the defendant.

*A. L. Miner*, for the defendant, cited *Londonderry v. Acton*, 8 Vt. 122; *Brookfield v. Hartland*, 6 Vt. 401; *Ludlow v. Weathersfield*, 18 Vt. 39.

*Waterman & Read*, for the plaintiff, cited *Royalton v. West Fairlee*, 11 Vt. 438; *Bethel v. Tunbridge*, 13 Vt. 445; 1 Tolman's Stats. (1808), 62, s. 26; *Ib.* 400, s. 1, 2; *Castleton v. Clarendon*, Brayt. 181; *Brandon v. Pittsford*, *Ib.* 183; *Reading v. Rockingham*, 2 Aik. 272; *Townshend v. Athens*, 1 Vt. 284; *Waterford v. Brookfield*, 2 Vt. 200; *New Haven v. Vergennes*, 8 Vt. 89; *Barnet v. Concord*, 4 Vt. 564; *Hale v. Turner*, 29 Vt. 350; *Pawlet v. Sandgate*, 17 Vt. 619; *Mount Holly v. Panton*, Brayt. 182.

The opinion of the court was delivered by

ROYCE, J. It is not claimed that the husband of the pauper, Henry E. Bates, ever acquired a settlement in his own right in

any town in the state, but that he had a derivative settlement from his mother, Elmira Bates; and it is clear, from the facts found by the referee, that if she ever had any settlement, it must have been derived from her father, Edward Bates. The referee has found, that it did not appear that Edward Bates had a residence in any other town in the state at the time of his removal into Landgrove, about the year 1818. He says that there was evidence tending to prove that he had lived with his family in Springfield or Rockingham for four or five years prior to his removal to Landgrove. Such a residence (if proven) might have given him a settlement in one or the other of those towns under the act of 1797. But it would seem that the evidence was not of such a character, in the judgment of the referee, as to justify him in finding the fact which it had a tendency to prove; for he says, notwithstanding this evidence: "It did not appear that he had a residence in any other town in this state when he removed to Landgrove." This finding is conclusive upon the question of Edward Bates's having had any legal settlement in any other town in the state at the time of his removal to Landgrove, and having no settlement, he could confer none upon his daughter.

The husband having no legal settlement, upon his abandonment of his wife in 1858, she was remitted to her settlement before marriage, if she had one. *Royalton v. West Fairlee*, 11 Vt. 438; *Bethel v. Tunbridge*, 13 Vt. 445.

The pauper had no settlement in Landgrove unless she had a derivative one from her father Daniel Swallow. It is conceded that he acquired a settlement in Landgrove by his residence in that town from 1814 till 1827, unless he was prevented by the warning out process under the act of 1801, which was put in evidence before the referee. The process was good in form, but it is claimed that the service and record were defective. It was held in *Townshend v. Athens*, 1 Vt. 284, and has been so held in numerous subsequent cases, that the statute in a warning out process must be strictly complied with. In *New Haven v. Vergennes*, 3 Vt. 89, the service was made in the same manner as in this, and was held to be bad. The objection to the sufficiency of the record was well taken. It was not competent to show when the

record was made by extrinsic evidence. So the settlement of Daniel Swallow was not interrupted by this process.

It is claimed that the pauper was not subject to removal on account of the interest which the referee has found that her husband had in some real estate in Winhall at the time he abandoned his family. The referee finds that he, at that time, owned or had an interest in about twelve acres of land and a small dwelling-house; that he was owing debts when he left, and a portion of the land was set off on execution against him. It does not appear that he had a freehold estate in the land, so she did not come within the rule laid down in *Londonderry v. Acton*, 3 Vt. 122, and hence the only question that can arise under this branch of the case is, could this interest which he owned in the dwelling-house and land, be made available for the support of the pauper so that she could not become legally chargeable to Winhall? The referee has found that it, in fact, yielded but a small share of what was necessary for such support, and, in the absence of any finding, or proof even, that it could have been made more productive, the fair and just inference is that, after exhausting all her available means, the town of Winhall was legally chargeable with a large proportion of her necessary support.

Judgment affirmed.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF WINDHAM,  
AT THE  
FEBRUARY TERM, 1878.

PRESENT:

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. ASAHEL PECK,  
HON. HOYT H. WHEELER, } ASSISTANT JUDGES.  
HON. JONATHAN ROSS,

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WILDER T. CHURCH AND LUCY M. CHURCH v. THE TOWN OF  
WESTMINSTER.

*Highway. Notice of Injury thereon. Motion in Arrest. Pleading. Gen. Stat. ch. 33, § 9.*

If a married woman receive an injury by reason of the insufficiency of a highway, it is sufficient if the notice to the town be signed by her alone, and not signed by her husband.

However it may have been at common law, by § 9, ch. 33, of the Gen. Stat., the writ and declaration are blended and made one instrument; and in pleading, the writ may be referred to, to help out a defective averment, or the want of a material averment, in the declaration.

CASE for an alleged injury to the plaintiff, Lucy M. Church, occasioned by reason of the insufficiency of a highway in the de-

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Church et al. v. Westminster.

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fendant town. Plea, the general issue, and trial by jury, September term, 1872, BARRETT, J., presiding.

The plaintiffs offered in evidence the following written notice :

“WESTMINSTER, January 7th, 1871.

To Henry C. Lane, Esq., one of the selectmen of the town of Westminster.

You are hereby notified that on the 22d day of December, 1870, I sustained a serious injury on easterly end of the bridge spanning Saxton's River near Gage's mill, in said town of Westminster, by reason of the insufficiency of said bridge, and that I claim satisfaction in damages of said town of Westminster, for said injury.

LUCY M. CHURCH.”

The defendant objected to the sufficiency of said notice ; but the court held the same sufficient ; to which the defendant excepted.

The plaintiff, Wilder T. Church, gave the town notice of his claim for damages, by a written notice in all respects like the one aforesaid, except that it was signed by him. Verdict for the plaintiffs. After verdict and before judgment, the defendant filed a motion in arrest, for the insufficiency of the declaration. The court overruled the motion, *pro forma*, and rendered judgment upon the verdict ; to which the defendant excepted. The question raised by the motion appears from the opinion.

Chas. N. Davenport and L. M. Read, for the defendant.

The notice is defective. Nothing appears to show a claim for satisfaction by the parties to this suit. The town is entitled to notice by the “person injured or claiming damage,” and that means the person or persons who afterward assert the claim by suit. Compliance with the statute is a condition precedent to the right of action. Acts of 1870, No. 49 ; *Matthie v. Barton*, 40 Vt. 286. It is no answer to this objection, to say that Lucy M. Church was the person actually injured, because, in contemplation of law, the injury was to her in her relation of wife of Wilder T. Church. While coverture existed, she had no several personal right which could be so injured by the defendant that she could legally claim satisfaction in damages. Again, the notice, like the

declaration, is silent in regard to her marital relation. We submit that at least enough should appear in the notice to show the town and the court that the parties claiming satisfaction in damage out of court, are the same parties who are asserting a claim in court.

The defendant, after verdict and before judgment, filed a motion in arrest, for the insufficiency of the declaration. The ground of the motion is, that neither count contains any averment showing any right of action in favor of the plaintiffs jointly. It is supposed that the parties at some time may have sustained the relation of husband and wife, but there is nothing in the declaration to show it. It is an elementary principle of the law of husband and wife, that for injuries to her person or character, they must sue jointly. 3 Bl. Com. 140; 1 Chit. Pl. 83; *Clapp v. Stoughton*, 10 Pick. 470; Bing. Inf. 247; Schoul. Dom. Rel. 106. And in the language of Schouler: "It is a well recognized principle both in England and America, that whenever the wife is the meritorious cause of action, her interest must appear on the face of the pleadings, or the omission will be fatal." Schoul. Dom. Rel. 107; *Ryan et ux. v. Madden*, 12 Vt. 51. And there is an entire uniformity of decision and authority to the same effect. Bing. Inf. 247; *Serres et ux. v. Dodd*, 5 B. & P. 405; *Thorne v. Dillingham*, 1 Denio, 254.

It will be claimed that the description of the parties in the writ, is equivalent to an express averment that they were husband and wife. We do not so understand it. Under our statute, which provides that "every original writ returnable to the county court, shall mention the court, time and place of appearance, and contain a declaration, setting forth the cause of action in due form of law," the plaintiff must set forth in "due form" in his declaration, what would constitute a sufficient cause of action. If he fails to do it, the common law remedy of demurrer, or motion in arrest, is still within the reach of the defendant. Gen. Stat. 290, § 9. The statute only operates to unite in one instrument, what at common law, constituted the three first steps in the path to justice. The *original writ*, which was a command under the great seal of the king to the defendant to appear in court and answer

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Church et al. v. Westminster.

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to what the plaintiff might allege against him ; the *process*, which was the method to compel compliance with the command in the writ, and which was sometimes in the form of an attachment, and sometimes of a *capias* ; and the *declaration*, which was " a specification in a methodical and legal form, of the circumstances which constitute the plaintiff's cause of action." 1 Chit. Pl. 276 ; 3 Bl. Com. 292. We have found no case where it has been held that a defective declaration can be cured by reference to the writ or process ; and such a decision would help to abolish the distinction between the really good lawyer, and the modern pretender.

*W. S. Myers*, for the plaintiffs.

The cause of action against the town became complete in the plaintiffs upon the receiving of the injury complained of through the insufficiency of the highway ; and the right to maintain it, upon the giving of the notice contemplated by the statute. The provision of the statute requiring notice is wholly for the benefit of the town, to enable it to seasonably investigate the claim, before the means of proof disappears by lapse of time, and through failure of memory and the death of witnesses, and, also, to guard against unfounded claims, on account of injuries pretended to have been received long before the claims are set up ; and we insist that a written notice that puts the town in the way of realizing all the benefit the statute was designed to confer, is sufficient. *Barton et ux. v. Montpelier*, 30 Vt. 650 ; *Kent v. Lincoln*, 32 Vt. 591 ; *Matthie v. Barton*, 40 Vt. 286. The notice signed by Lucy M. Church is not only a *substantial*, but a *literal* compliance with the statute.

Although it was necessary that the husband, Wilder T. Church, should join in the suit against the town, in order to enforce a claim for damages after the right to maintain it had been perfected by notice, yet, notice given in the name of the wife (the person injured), is as effectual to the town for the purpose of putting them in the way of realizing all the benefits the statute was designed to confer, as though the notice had been given by the husband, or by the husband and wife jointly. It was the wife that received the injury. It is a cause of action that would have sur-

vived to her in case of the death of her husband. It is therefore her suit; and it is only to answer the requirement of a technical rule of law, that the husband is required to be joined.

Again, it is conceded that the town received from the plaintiff husband a written notice of the happening of the accident and the receiving of the injury, identical with the notice of the plaintiff wife, and such notice given by the husband, was held to be good, by BARRETT, J., in delivering the opinion of the court in *Barton et ux. v. Montpelier*. Therefore, if the notice of the husband was good and sufficient (and it was received without objection), and the notice of the wife was improperly received by the court below (which we do not concede), it was not such an error as will justify this court in reversing the judgment of the county court, because the defendant has been in no manner prejudiced thereby.

The declaration is sufficient. Under our practice, the writ and declaration are made one process. The relation of the plaintiffs to each other at the time of bringing the suit, was set up in the writ. It is declared that Lucy M. Church is the wife of Wilder T. Church, and as such, she joins with him in bringing the suit. The allegation in the declaration is, "that the said Lucy M. Church was greatly injured," &c. Reference is to be had to what has been before stated in the writ, viz: "Lucy M. Church, wife of the said Wilder T. Church.

If there is any informality in the declaration in this particular, it is purely technical, and was cured by the verdict.

No averment is necessary that Lucy M. Church was the wife of Wilder T. Church at the time of the happening of the injury complained of. It is sufficient that she was his wife at the time the action was brought.

The opinion of the court was delivered by

ROSS, J. I. The written notice signed by the plaintiff wife, and delivered the selectman of the town, is sufficient. It contains all that is required by the statute, and was seasonably delivered. The defendant makes no question as to its sufficiency, except that it should have been signed by both plaintiffs. The statute re-



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quires the notice to be given "by the person injured or claiming damage." This language indicates that when the injury for which damages are claimed is to a person, that person must give the notice, and when the injury is to the property, the owner of the property damaged must give the notice. Hence the language is in the alternative. The wife alone is the person injured. We also think, though by the common law the husband must be joined with her as plaintiff in the suit, she alone is the person claiming damage; and the notice would be sufficient if the language of the statute had been, "by the person injured *and* claiming damage." She is the meritorious cause of action. If he had died before, or during the pendency of, the suit, the action would have survived to her. The damages when recovered, until reduced to possession by the husband, belong to the wife. If she had died before, or during, the pendency of the suit, the action would not have survived to him. *Russell et ux. v. Corne*, 1 Salk. 119; *Higgins v. Butcher*, Yelv. 89. The defendant is entitled to no advantage by its exception.

II. We think, too, that the motion in arrest is not well founded. The defendant claims that the declaration fails to disclose any cause of action in these plaintiffs jointly, inasmuch as it does not allege that Lucy M. Church is the wife of Wilder T. Church, and claims that the court cannot look to any part of the writ outside the declaration proper, to help out this alleged deficiency. Whether it was true, as claimed by the defendant, that under the common law proceedings, where the "original writ," "process," and "declaration," were each a separate and distinct instrument, complete in and of itself, no reference could be had by the court to the "original writ," or "process," to help out any lack of averment or substance in the declaration, we have not taken time to examine or determine. By Gen. Stat. ch. 33, § 9, the three instruments which the plaintiff at common law would have been compelled to use, to bring the defendant into court and state his cause of action, are blended in one instrument, and the declaration is thereby made a part of the writ. The whole must be treated and construed as one instrument. When, therefore, the defendant is summoned to answer to Wilder T. Church and Lucy

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M. Church, wife of the said Wilder T., and the declaration states that "the said plaintiffs were passing along, upon, and over said bridge," &c., "and the said Lucy M. Church was thereby greatly injured," &c., the defendant, by the words "*said* Lucy M. Church," is by the pleader referred to the previous description which has been given of Lucy M. Church, to wit, "wife of said Wilder T."; and the words, "*said* Lucy M. Church," by the reference to what had before been said of her, was equivalent to saying, "and Lucy M. Church, who is, at the date of this writ, the wife of Wilder T. Church, was thereby greatly injured."

With such an averment in the declaration, it discloses a cause of action in Lucy M. Church, for the recovery of which, by reason of the marital relation existing between them, Wilder T. and Lucy M. Church must join as plaintiffs.

Judgment affirmed.

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RUSSELL CLAYTON v. S. WALTER SCOTT, DANIEL C. CARPENTER,  
AND JAMES W. CARPENTER.\*

*False Imprisonment. Justification under Process.*

In an action of trespass for false imprisonment, an officer cannot justify under an execution regular upon its face, where he commits the debtor in a different county from the one in which the arrest is made, when there is a legal jail in the latter county, although the commitment be made in the county commanded in the execution.

THIS was an action of trespass for false imprisonment. The trespass complained of was, that the defendants arrested the plaintiff in Windham county, wherein there was a legal jail, and imprisoned him in a jail in Bennington county. The defendants severally pleaded *not guilty*, and the defendant Daniel C. Carpenter, justified as constable of Readsboro, under an execution in favor of the defendant Scott against the plaintiff, issued by the county court of Bennington county, and regular upon its face, whereby, for want of goods, &c., the officer was commanded to

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\* This case was tried at the February term, 1872.

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take the body of the plaintiff and him commit to the keeper of the jail in Bennington or Manchester, in the county of Bennington. The plea did not allege that at the time of said arrest there was no legal jail in the county of Windham.

The plaintiff joined issue on the pleas of *not guilty*, and demurred generally to the plea of justification.

The court, at the April term, 1871, BARRETT, J., presiding, overruled the demurrer, *pro forma*, and adjudged the plea sufficient, and rendered judgment for all the defendants,—the court suggesting that the sufficiency of said plea should be determined by the supreme court before the expense of a jury trial was incurred. Exceptions by the plaintiff.

*Chas. N. Davenport* and *A. Stoddard*, for the plaintiff.

I. The defendant had no right to imprison the plaintiff elsewhere than in the county jail of Windham county, the county in which the arrest was made. The statute is explicit and peremptory: "Whenever any officer, or other person authorized by law to serve any writ, warrant, execution, or process, is required by law to commit any person to jail, such commitment shall be made in the county in which the arrest shall be made, unless otherwise directed by law." Gen. Stat. ch. 33, § 59. The only exception is where there is no legal jail in the county where the arrest is made; then the commitment may be made in an adjoining county, where there is such jail. Ib. ch. 33, § 60.

The defendants' counsel probably rely upon the principle that a process, issuing from a court of competent jurisdiction, regular upon its face, is a sufficient justification to the officer who executes it. We concede that this principle is well supported by authority. *Hatch, ex parte*, 2 Aik. 28; *Gage v. Barnes*, 11 Vt. 195; *Churchill v. Churchill*, 12 Vt. 661. In *Churchill v. Churchill*, a case quite as strong as the defendants will probably be able to find, Judge COLLAMER says: "An officer is always protected when he serves a process issuing from competent authority, or more properly, when upon the face of the precept the officer cannot perceive a want of jurisdiction." There could have been no difficulty in this officer perceiving that the command in

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this precept was in conflict with the statute. He found the plaintiff at his residence in Windham county. The statute commanded him to commit to the jail in Windham county. The precept commanded him to commit to either jail in Bennington county. Could any thing be more obvious than that the authority issuing the precept had no jurisdiction to override the statute? So much of this process as authorized the officer to disregard the statute, is irregular and void, and it is no answer to say that the officer may have been ignorant of the statute. An officer is bound to know the law; and when the warrant on the face of it appears to be illegal, and he executes it, he is liable to the person arrested. *Gramon v. Raymond*, 1 Conn. 48; *Lewis v. Avery*, 8 Vt. 287.

II. This process gave the officer authority to levy upon the plaintiff's body, in default of payment. When arrested, his duty was to commit him in Windham county. Had he done so, this process would have been a full and complete protection and justification *for him*. But when he transported the plaintiff out of the county, and imprisoned him elsewhere, he became a trespasser *ab initio*. This unlawful act divested him of the authority with which the execution had clothed him, and the act assumed the same character, and involved the same consequences, as if he had no process, and no official authority. 1 Smith Lead. Cas. 166; *Lamb v. Day et al.* 8 Vt. 407; *Piersons v. Gale et al.* Ib. 509; *Bond v. Wilder*, 16 Vt. 393; *Nelson v. Denison*, 17 Vt. 73; *Abbott v. Kimball et al.* 19 Vt. 551; *Hall v. Ray*, 40 Vt. 576; *Kenerson v. Bacon*, 41 Vt. 573, 579.

*James W. Carpenter*, for the defendants.

It was the duty of the defendant Daniel C. Carpenter, as constable of Readsboro, to receive all writs and precepts, and execute and return the same according to the directions thereof. Gen. Stat. 86, 88, 115, §§ 4, 20, 79; Acts of 1869, 38, § 1; *Stoddard v. Tarbell*, 20 Vt. 321; *Chase v. Plymouth*, Ib. 469; *Hill v. Pratt*, 29 Vt. 119. And he would be liable to fine and damages for refusing. Gen. Stat. 88, § 21. All writs shall run into any county or place in this state, and may be there served and executed. Gen. Stat. 289, § 6.

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The opinion of the court was delivered by

ROYCE, J. This case was tried in the court below upon a general demurrer to the defendant Daniel C. Carpenter's second plea. The plea does not attempt to justify the trespass complained of upon any other ground than that he was obeying the command of the precept set out in the plea. That precept appears to be legal in form, and the officer could, no doubt, have justified under it, if he had executed it in the manner required by law. The declaration charges that the defendant arrested the plaintiff in Putney, in the county of Windham, and imprisoned him in the jail in Bennington, in the county of Bennington, when there was a lawful jail at Newfane, in the county of Windham. The statute provides, ch. 33, § 59, that, "whenever any officer, or other person authorized by law to serve any writ, warrant, execution or process, is required by law to commit any person to jail, such commitment shall be made in the county in which the arrest shall be made, unless otherwise directed by law." Section sixty provides that, "if there shall not be a legal jail in the county where such arrest may be made, such commitment shall be made in an adjoining county where there is a legal jail."

The fact that there was a legal jail in the county of Windham, where the arrest was made, is not denied in the plea, and it was clearly the duty of the officer to have committed the plaintiff to that jail, unless the command in his precept to commit him to the jail in Bennington or Manchester, in the county of Bennington, is to be regarded of paramount obligation to the requirements of a statute law of the state. We do not so regard it. All that is required of an officer is, that he shall execute his precept according to law; and when he violates the law in its execution, he cannot justify under it. So that, admitting all that is stated in the plea, it furnishes no justification for the trespasses complained of in the declaration. And the judgment of the county court, that the plea was sufficient, is reversed, and cause remanded.

## ERWIN &amp; MCKELSEY v. RUSSELL STAFFORD.

*Intoxicating Liquor. Place of Contract. Illegal Contract.  
Practice.*

The agent of the plaintiffs, who were wholesale liquor-dealers in New York, was authorized to take orders for liquors, and to agree on the price and time of payment; but the plaintiffs, by an understanding with said agent, had a right to reject his orders if they chose. The defendant, a tavern-keeper in Whitingham, in this state, having no knowledge of such understanding, contracted with said agent, at Whitingham, for a bill of liquors to be sent him by the plaintiffs; and said agent accordingly ordered the liquors from Brattleboro by letter, and they were sent to the defendant, and retailed by him at his bar. *Held*, that said contract of sale was made in this state, and void.

The defendant himself subsequently ordered a bill of liquors, by letter sent directly to the plaintiffs in New York, which were sent, and retailed by him as aforesaid. *Held*, that the sale thereof was made in New York, and valid.

The plaintiffs charged said liquors to the defendant as they were sold, and the defendant made payments therefor while the account was running, and the money paid was credited to him. The plaintiffs presented the whole account, debt and credit, before the auditor for adjustment, and the defendant treated the whole account thus presented as proper to be settled in this action. *Held*, that therefore no question arose as to whether the defendant could recover back any of the money thus paid; but that the charges were to be determined according to their validity to go into the accounting, and to affect the general result accordingly, and that the credits were to be treated as payments upon the running account, and not as payments upon any particular item, or bill, of the account, and were to be computed in favor of the defendant in arriving at the ultimate result.

When a judgment is more favorable to a party than he is entitled to have it, he cannot have it reversed on his own exceptions; and, it not being opened on his exceptions, the other party, who does not except, is not entitled to have it corrected in his favor.

**BOOK ACCOUNT.** The plaintiffs were wholesale liquor-dealers in the city of New York, and the defendant was a tavern-keeper in Whitingham, in this state. Early in May, 1869, one Knight, a traveling and soliciting agent of the plaintiffs, on one of his customary trips through that vicinity, met the defendant in said Whitingham, and the defendant told him that he wanted the plaintiffs to send him a bill of certain liquors, which he named, and the price of the liquors was then and there agreed upon. On his return to Brattleboro, his head-quarters when operating in that section, and on the 12th of said May, Knight wrote the plaintiffs in New York, ordering said liquors to be forwarded to the defendant at Whitingham. The plaintiffs received said letter by due course of mail, and, on the 14th of said May, forwarded said liquors to the defendant as therein requested, to the amount of

\$421.25, and \$8.90 for packing, cartage, &c. The defendant received the same, and retailed them at his bar. Knight had authority to solicit orders for liquors, and agree on the price and time of payment, but the plaintiffs had the right, on receipt of his orders in New York, to fill them or not, at their option, having regard to the solvency of the purchasers, and their reliability, in view of the laws of Vermont—which were well understood by all parties—in making payments; but it did not appear that the defendant was cognizant of such limitation of Knight's authority. Knight told the defendant on the occasion aforesaid, if he wanted more liquors before he came round again, to send an order himself directly to the plaintiffs in New York. On the 3d of August, 1869, Knight was at the defendant's tavern, and the defendant produced the bill of said liquors, and paid Knight \$130.15 thereon, and there was then a deduction made of \$9.75 on the item of rum therein, and the sum paid and the amount deducted were endorsed on the bill. On the 1st of October, 1869, the defendant sent an order directly to the plaintiffs in New York for another bill of liquors, which they sent on the 9th of the same month to the amount of \$156.25. On the 2d of November, 1869, Knight again called on the defendant, when the first bill of liquors was again produced, and the defendant paid Knight \$150 more, which was indorsed thereon. The defendant then told Knight that he had ordered another bill of liquors of the plaintiffs, and complained that he had not received it. This was the first Knight knew that the defendant had ordered any liquors himself. At the time of the payment last aforesaid, the last bill of liquors had been shipped from New York, but not received by the defendant; but he subsequently received the liquors, and retailed them at his bar.

The auditor found, if the contract for the first bill of liquors was valid, that the defendant was indebted to the plaintiffs in the sum of \$362.06; but that if said contract was not valid, and the payment first aforesaid should apply as a voluntary payment thereon, the defendant was indebted in the sum of \$182.37; and that, if said contract was not valid and said payment should not apply thereon as aforesaid, the defendant was indebted in the sum of \$7.00.

The court, at the September term, 1872, BARRETT, J., presiding, rendered judgment, *pro forma*, on the report for the defendant. Exceptions by the plaintiffs.

*Field & Tyler*, for the plaintiffs.

We claim that the contract for the first bill of liquors was made in New York, and did not contravene the laws of this state. The authority of Knight was limited to soliciting orders and submitting them to the plaintiffs for them to reject or perfect into contracts, at their option, and this limitation the defendant was bound to know. In any event, there was an implied contract to pay the item of \$8.90 for packing, cartage, &c.

The contract for the last bill was made in New York; and is valid, although the defendant acted upon Knight's suggestion in sending the order. *Backman v. Mussey*, 31 Vt. 547. Neither would the contract be vitiated by the mere fact that the plaintiffs knew the illegal purpose to which the liquors were to be applied. *Backman v. Wright*, 27 Vt. 187; *Tuttle et al. v. Holland*, 43 Vt. 542.

It is insisted, however, that both payments should be applied upon the last bill. But they were both made voluntarily upon the first bill, and applied thereon, and the court should not disturb such application. *Backman v. Wright*, *supra*; *Bancroft v. Dumas*, 21 Vt. 456.

*H. N. Hix* and *George Howe*, for the defendant.

The first question is, as to the legality of the sale of the liquors. The defendant claims that the sale of the first bill of liquors was made in this state, and void under the laws thereof. If the plaintiffs cannot recover for the first bill of liquors, and can recover for the second, then the debtor side of plaintiffs' book is only one hundred and fifty-six dollars and twenty-five cents. The sale of the second bill of liquors, being made in another state, is valid, and not in contravention of the laws of this state. *Territt et al. v. Bartlett*, 21 Vt. 184; *McConihe & Co. v. McMann*, 27 Vt. 95; *Backman v. Wright*, *ib.* 187; *Backman v. Mussey*, 31 Vt. 547.



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If the sale of the first bill of liquors is illegal and void, then the second question is as to the application of the payments. *Tuttle et al. v. Holland*, 48 Vt. 542. The defendant contends that, under our statute of 1852 in regard to intoxicating liquors, and the amendments thereto of 1854 and 1855, no application of any money paid by the defendant to the plaintiffs for intoxicating liquors, when the sale of such liquors was illegal and void, can have any legal effect as a payment. When the plaintiffs undertook to apply the payments upon the first bill, although with the consent of the defendant, they did it in violation of law without consideration, and against law, equity, and good conscience. The money could not operate instantly in partial extinguishment of the debt, because none existed at the time it was paid. Consequently, the plaintiffs held the money for the use of the defendant, and whatever legal indebtedness existed between them after such payment, could be satisfied by this money. *Backman v. Mussey*, *supra*.

The opinion of the court was delivered by

WHEELER, J. The plaintiffs appear to have presented all the items involved in this controversy, both debt and credit, to the auditor for adjustment, and the defendant appears to have treated the whole of the deal between him and the plaintiffs so presented by them, as being proper to be settled in this action. There is therefore no question to be determined as to whether money paid for intoxicating liquors sold contrary to law, can be recovered back or not, in this form of action. The plaintiffs sold the goods charged to the defendant at different times, and charged them to him, and he made payments while the account was running, and they credited him with the money paid, and when they brought the whole account before the auditor for adjustment, the charges were to be determined according to their validity to go into the accounting, and to affect the general result accordingly, and the credits were to be treated as payments upon the running account, and not as payments upon any particular items, or bill, of the account, and were to be computed in favor of the defendant in arriving at the ultimate balance. This makes

it unnecessary to decide any question as to the application of payments upon any particular items, as might have been necessary if either of the bills in controversy had stood by itself, to be adjudicated upon as a cause of action without reference to the other bill, or to the fact that it was a part of a running account.

The contract of sale of the first bill of liquors, so far as the defendant was concerned, was completed between him and the plaintiffs' agent in this state. They appear to have had some understanding with their agent that they might repudiate his contracts if they chose, but the defendant did not know this, and, therefore, cannot be considered to have made mere propositions for a contract to the agent to be accepted or rejected by the plaintiffs in New York. Whether the understanding with the agent so affected his authority that the plaintiffs would not be bound by his contract that was otherwise binding, or not, is not necessary to be determined; he assumed to, and did, make a contract in their behalf in this state, and they let that contract stand and acted upon it as their contract, and the legality of it stands the same as if they had themselves made it here. No question is made but that the contract, if made in this state, was illegal, so as to defeat the right to recover for the liquors sold by it. The first bill of liquors must, for these reasons, be disallowed in the accounting. No serious question has been, or could well be, made but that the plaintiffs are entitled to be allowed for the other bill of liquors. The account should stand with the second bill of liquors, \$156.25, charged to the defendant, and the payment of \$180.15 and that of \$150 credited to him. This would leave a balance of \$123.90 due the defendant from the plaintiffs to balance book accounts between them.

The judgment of the court below was for the defendant for his costs. This judgment was more favorable to the plaintiffs than they were entitled to have it, and, therefore, they are not entitled to have it reversed. The defendant did not except, and as the judgment is not opened on the plaintiffs' exceptions, he is not entitled to have it corrected in his favor.

Judgment affirmed.

F. H. FRANKS v. J. H. LOCKEY AND H. E. THURSTON.

*Setting aside Judgment.*

The defendants were partners, and as such, were sued. There was no personal service of the writ on the defendant L., who resided out of the state, and had no knowledge of the suit until after judgment was rendered therein; but the defendant T., who resided in the state, and had the management of the partnership business, was personally served, and employed counsel to appear for both defendants, who appeared accordingly, and consented to judgment against both defendants, which was rendered, and execution issued. At the next term, said judgment was sued. At a subsequent term, the court, on motion of L. for that purpose, vacated said judgment as to L., and ordered the case brought forward upon the docket for trial. *Held*, that the court had the legal power so to do.

THIS was a petition by the defendant, Lockey, to vacate as to him, a judgment rendered in this suit against the defendants, at the April term, 1868, and to bring the case forward upon the docket for trial as to him. The facts were these :

In January, 1867, the defendants entered into articles of co-partnership under the name of H. E. Thurston & Co. Lockey did not give his personal attention to the business, but resided in Massachusetts. Thurston resided in Sunderland, Vt., where the partnership business was carried on, and personally superintended the business. The partnership owned several buildings there, among which was a hotel, which they used for a boarding-house for their help, and for entertaining travelers, they having a license for that purpose. Tuttle & Reed, liquor-dealers in New Haven, Conn., sold to said Thurston a quantity of liquors, which Thurston bought upon the credit of the firm, and sold in said hotel, contrary to law. Lockey had no knowledge of said purchase and sale of the liquor. On the 2d of September, 1867, Thurston gave Tuttle & Reed a check of \$2,000 for said liquors, signed by the firm name of H. E. Thurston & Co., and payable to said Tuttle & Reed, or order. Lockey had no knowledge of the giving of said check. The last of September, 1867, Lockey went to Sunderland, and found the business in such condition that he commenced a suit in chancery against Thurston for the dissolution of the partnership, procured the appointment of a receiver, and got said Thurston enjoined from further conducting the business, or in any way interfering therewith, which suit was entered at the December term, in Bennington county, and continued to the June term; meanwhile they made a final settlement of their partnership busi-

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ness, and Thurston went out of the business, and Lockey assumed and carried it on. On the 8th of November, 1867, the plaintiff brought this suit upon said check, as indorsee thereof, against the defendants as co-partners, returnable to the April term, 1868. The writ was served on the same day by making a nominal attachment, and by delivering a copy thereof to said Thurston, and leaving a copy with him for said Lockey. Thurston, without the knowledge of Lockey, employed Nathan Hall, an attorney of the court, to appear in said suit for him and the said Lockey, who appeared accordingly for both the defendants. Charles N. Davenport, an attorney of the court, also entered a general appearance in said suit, for the defendants, which he did by reason of a general retainer which he had long prior thereto received from the said Thurston. At the term last aforesaid, judgment was rendered in said suit for the plaintiff for the amount of said check and costs, by the consent of said Hall, and execution issued. At the September term of said court, 1868, a suit was brought upon said judgment and certain parties trustee, and a copy of the writ was left with one of the trustees for said Lockey. The first knowledge Lockey ever had of the existence of this original suit, or of said judgment, was when the trustee handed him said copy.

Upon the foregoing facts, the court, at the September term, 1870, BARRETT, J., presiding, vacated said judgment as to Lockey, and ordered the case brought forward for trial; to which the plaintiff excepted. At the September term, 1872, final judgment was rendered in the case for the defendant Lockey, upon the verdict of a jury.

*Clark & Haskins*, for the plaintiff.

We understand the rule of law to be well settled by repeated adjudications, that a co-defendant, being a co-partner, or former co-partner, and a co-contractor, has authority to employ counsel to appear, not only for himself, but for his co-defendant; and that a general appearance entered by the attorney, will bind all. *Scott v. Larkin*, 13 Vt. 112; *Bennett et al. v. Stickney*, 17 Vt. 531; *Spaulding et al. v. Swift*, 18 Vt. 214; *Abbott & Co. v. Dutton*, 44 Vt. 546. The case of *Whitney et al. v. Silver*, 22 Vt. 634, does not in fact controvert the position we have here taken. In that case, the question of the right of one co-defendant to employ

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an attorney for both was not in issue. There was no attorney employed by either defendant, and none, in fact appeared.

But if, notwithstanding the decisions above cited, this court should hold that, under the circumstances of this case, Thurston had no authority to employ counsel to appear in behalf of Lockett, we then insist that the appearance of Hall and Davenport, as stated, is conclusive upon Lockett,—certainly as between him and the plaintiff. We contend that the well established rule of law is, that when an attorney of record enters an appearance either to prosecute or defend a suit, without the knowledge or consent of the party, and even though the party has had no notice, a judgment rendered under such circumstances, in the absence of fraud or collusion, is absolutely binding on the party, and the court has no power for such a cause, to set aside the judgment; but that the party prejudiced thereby must seek his remedy on the attorney. *St. Albans et als. v. Bush*, 4 Vt. 58; *Newcomb et al. v. Peck*, 17 Vt. 302; *Spaulding et al. v. Swift*, 18 Vt. 214; *Abbott & Co. v. Dutton*, 44 Vt. 546.

Again, we insist that, if the court below had the authority to vacate its judgment previously rendered, and to restore the case to the docket for trial, there was error in this,—that the proceedings had were irregular. The case shows that the judgment was rendered against the complainant Lockett and Thurston, jointly. Therefore, if it was invalid or irregular as to one, it was equally so as to the other. And if from any irregularity in the former proceedings, the court below were authorized to vacate that judgment, we contend they could only do it at the instance of both defendants. A judgment thus rendered must either stand or fall *in toto*. It cannot be vacated as to one, and left to stand in full force and effect as to the other. *Tittemore v. Wainwright*, 16 Vt. 173; *Whitney et al. v. Silver*, 22 Vt. 634; *Starbird et als. v. Moore*, 21 Vt. 529; *Herrick v. Orange Co. Bank*, 27 Vt. 584. The foregoing are all cases arising under the writ of *audita querela*, the effect of which writ, the relief sought to be obtained, and the principles involved, are somewhat analagous to those in proceedings of this nature, and, to a certain extent, are concurrent remedies. *Porter v. Vaughn*, 24 Vt. 211.

It may be urged that the granting or denying of the prayer of the petitioner, was a matter resting entirely within the discretion of the court below ; hence their proceedings are not subject to revision by this court. We do not question but the county court has the right, within certain limits, to order its records and judgments corrected, and perhaps, for sufficient reasons, to vacate its judgments, and open the case for further proceedings. Yet, this power, if it exists, must be exercised within the pale of well established rules. And while, perhaps, they have the power to correct an error *in fact*, which has become a part of their records, still, we insist they have no right to blot out, to erase, or in any manner to interfere with, a record made up in accordance with the fact.

Again, the case shows that the original judgment of the county court was in all respects regular and correct, both as to the issuing and service of the writ, the proceedings of the court, and the doings of the clerk in making up the judgment, and in the issuing of execution. This being so, the court below had no power, discretionary or otherwise, to interfere in the premises. *Smith et al. v. Howard*, 41 Vt. 74.

*C. N. Davenport*, for the defendant Lockey.

Every court must, from necessity, have a revisory power over its own proceedings and records. Errors are committed, accidents and mistakes happen, in the best regulated courts. Frauds are perpetrated, and the judgments of the court sometimes made the instrument of wrong and injustice. In the language of HALL, J., "It is a power incident to courts, to inquire into the correctness of their own proceedings, to correct their records according to the truth, if erroneously made, or to relieve a party against the unjust operations of a record, on ascertaining by a direct inquiry into the matter that the record ought not to have been so made. This proceeding is usually on motion founded on affidavits and notice, and the power is exercised in a summary way whenever the court in its sound discretion considers that the furtherance of justice requires it." *Scott v. Stewart*, 5 Vt. 57 ; *Adams et al. v. Howard*, 14 Vt. 560 ; *Mosseaux v. Brigham*, 19 Vt. 457, 460 ; *Beckwith*

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v. *Middlesex*, 20 Vt. 598; *Foster v. Austin*, 88. Vt. 615, 617; *Montgomery v. Vinton*, 87 Vt. 514; *Smith et al. v. Howard*, 41 Vt. 74. In the case last cited, PECK, J., says: "There is no doubt but the county court, within certain limits, has such power over its records and judgments as to warrant the court in ordering them corrected, and, if necessary, for sufficient reasons, to order a case to be brought forward after final judgment, and vacate that judgment and open the case for further proceedings."

It will be observed that no third person, like bail, or receptor, could be injured by the exercise of the court's discretion in opening this case for trial. It only operated to deprive the plaintiff of the advantage of a collusive judgment, to which he was not, as the sequel proved, entitled.

The power to vacate a judgment and open a case for trial, is a discretionary power, and its exercise in a proper case is not subject to revision on exceptions. *Mosseaux v. Brigham*, 19 Vt. 460; *Downs et al. v. Read*, 82 Vt. 785; *Smith et al. v. Howard*, *supra*.

The opinion of the court was delivered by

PECK, J. The only question is whether the county court, upon the facts stated, legally had the power to vacate the judgment as to the defendant Lockey on his petition, and bring the case forward for trial as to him. We think the court had such power. It is objected by the plaintiff that if the county court had such power, the proceeding was irregular in this, that if the judgment was vacated as to the defendant Lockey, it should have been vacated also as to the defendant Thurston. No such question is presented by the exceptions, as it does not appear that either the plaintiff Franks, or the defendant Thurston, asked to have the judgment vacated as to Thurston, if vacated as to Lockey. The cause for vacating the judgment did not extend to Thurston.

Exceptions overruled and judgment affirmed.

LEVI K. FULLER v. JOHN ARMS.

[ IN CHANCERY. ]

*Deed. Construction. Condition.*

The defendant, by deed of warranty, conveyed certain land to S. by metes and bounds, and in the premises of the deed, immediately following the description, was this clause: "Conditioned that no building or erection is ever to be made on said land, except a dwelling-house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges, and interests of said Arms, or his heirs or assigns, to a greater degree than a dwelling-house and out-buildings as aforesaid would affect his and their rights, interests, and privileges; the said Arms being now the owner of a house and land westerly of, and near, said premises; and conditioned, also, that no building is to be erected on said land, which shall extend more than twenty feet southerly of the main body of the dwelling-house now owned and occupied by the said John Arms." In all other respects, said deed was in the usual form of a warranty deed without condition.

*Held*, that said clause did not constitute a condition precedent or subsequent; nor a covenant that the grantee would abide by the terms thereof; but was a part of the description of the estate, or interest, which passed by the deed to the grantee, and showed, with the rest of the description, what rights in the land passed to the grantee, and what were left remaining in the grantor; and that, the land passing to the grantee with the use thereof thus restricted, those claiming under the grantee could not make erections thereon in violation of those restrictions.

## APPEAL from the court of chancery:

The bill set forth that John Arms, the defendant, on the 17th day of August, 1853, conveyed to Roswell G. Shurtliff, by warranty deed, the land in question, situate in the village of Bellows Falls, describing it by metes and bounds, "conditioned that no building or erection is ever to be made on said land, except a dwelling-house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges, and interests of said Arms, or his heirs or assigns, to a greater degree than a dwelling-house and out-buildings as aforesaid would affect his and their rights, interests, and privileges; the said Arms being now the owner of a house and land westerly of, and near, said premises"; and conditioned, also, that "no building is to be erected on said land, which shall extend more than twenty feet southerly of the main body of the dwelling-house now owned and occupied by the said John Arms"; that the defendant was at the time of the execution of said deed, and still is, the owner of the house and lot opposite said land on the west side of the street; that said Shurtliff and



his wife conveyed by deed the same premises to Swett F. Brown, on the 14th day of May, 1858, subject to the same restriction as to erections, "provided that nothing herein contained shall prevent the erection of a church on said lot, which shall not extend more than twenty feet south of the main body of said Arms's house"; that said Brown conveyed said premises to the First Baptist Society of Bellows Falls, on the 12th day of October, 1866, subject to the restrictions and provisos aforesaid; and that the said society conveyed to the orator on the 16th day of March, 1872, the northerly portion of said premises, describing the same by metes and bounds, to hold *in trust* for said society; that the orator had undertaken to build, and still proposed to erect, a dwelling-house and out-buildings thereon, suitable for a parsonage; that in or about the year 1858, said society erected a meeting-house upon the first above described premises, which they had hitherto used as a place of worship; that the said Arms threatened to prevent the orator from making such erections, and to vex and harass him by suits at law, or other process, and hinder and prevent him from executing his charitable purposes in the erection of such parsonage. Prayer, that the defendant be restrained from interfering with the orator, or in any way preventing him from erecting, on the premises conveyed to him, a dwelling-house and out-buildings, suitable for a parsonage, and for further relief.

The said condition in said first named deed was in the premises of the deed, and immediately followed the description of the land conveyed. In all other respects, said deed was in the usual form of a warranty deed without condition.

The answer admitted the several conveyances and the conditions thereof, as alleged in the bill. Averred that the premises so conveyed were situated on the terrace west of, and fronting, the "square," so called, in the village of Bellows Falls, and that the defendant's dwelling-house, and the grounds connected therewith, lie immediately west of said premises, and that said dwelling-house and grounds were so situated that a view might be had therefrom in an easterly direction over the lands so conveyed, of said square, and of that portion of the village lying east of the square; also, a view of the Connecticut River easterly of said village, and for a long distance both north and south of said village, together with a view of the mountain scenery east of said river; and that said views are of great beauty, and add in a great measure to the value of the defendant's said dwelling-house and

grounds. Admitted the erection of a church on said premises, and averred that the same was erected in lieu of the right of the defendant's said grantees to erect a dwelling-house and out-buildings thereon, as provided for in the condition contained in his deed to said Shurtliff, and that any further erection on said premises would have the effect to interfere with, and obstruct, the views from the defendant's said dwelling-house and grounds, and render the same of much less value than if no such erections should be made. Admitted that the orator had undertaken, and still threatens, to erect on that portion of said premises conveyed to him in trust, a dwelling-house and out-buildings, and insisted that the orator had no right to erect such dwelling-house and out-buildings thereon, without the defendant's consent, and that by erecting said church, the said Brown, and his grantees, had forfeited all rights which they had to erect a dwelling-house and out-buildings on any part of the premises so conveyed; and admitted that the defendant had forbidden the orator to make any erection on said premises, but denied that he had in any way threatened to vex or harass the orator, to prevent him from making such erections.

The answer was traversed, and testimony taken

The defendant's testimony was mainly as to the character and extent of the view from the defendant's house and grounds, and as to the extent the erections proposed by the orator would obstruct said view, and affect the value of said property, and tended to support the allegations of the bill. The court of chancery, at the September term, 1872, dismissed the bill; from which decree the orator appealed.

*Charles N. Davenport*, for the orator.

1. It will be noticed that there is no clause of re-entry in the deed, nor does it declare that in any contingency the estate conveyed shall cease, or the deed become void.

2. It is unimportant to consider the second clause in this deed, because the orator cannot erect upon the land conveyed to him any building which will extend "twenty feet southerly of the main body" of the defendant's dwelling-house. It is with the northerly part of the lot that the orator has to do, and therefore, it is the first clause that the orator desires the court to construe, before he makes his contemplated erections.

It will probably be claimed that this clause is operative, either as creating a "condition subsequent," which, if not performed, will work a forfeiture of the estate to the grantor, or as a covenant binding upon, and running with, the land, wherever it may be conveyed.

It is neither the one nor the other. It is too vague, general, and uncertain in its terms and provisions, to be operative either as a covenant or a condition. It will not be denied that the grantor, Shurtliff, had the right to erect a dwelling-house and out-buildings for the same. What was to be the size and dimensions of this dwelling-house? Who was to judge when, where, and how, that dwelling should be erected? What out-buildings could be erected? Was he limited to one barn, a shed, a carriage-house, an ice-house, a pig-stye? Might he not, if inclination or taste prompted it, erect a conservatory or greenhouse? Had Arms the right to dictate or control as to these erections? If he chose not to erect a dwelling-house and out-buildings, he had a right to build "such other buildings and erections as would not affect the rights, privileges, and interests of said Arms, or his heirs and assigns," &c. If this means any thing, it means that the grantee had the right to build just such erections on the land as he pleased, provided the "rights, privileges, and interests" of Arms, his heirs and assigns, would not be affected to a greater degree than by building just such a dwelling-house, as to form and construction, as his means, inclination, and taste might prompt, surrounded by just such out-buildings as his judgment of his own needs might impel him to build. What "right, interest, or privilege" of Arms, or his "heirs and assigns," can be affected? By what means can this court ascertain how the erection of a particular building in a particular place on this lot, will affect any right, interest, or privilege of Arms?

The truth is, these high-sounding words do not represent ideas. They were inserted in the deed with no well defined notion of their meaning or application. It is not claimed by the defendant that the erection of a parsonage will impair any "right" or "privilege," which appertains to his realty, like a right of way, or other easement. He says in his testimony that such an erec-

tion will "cut off a portion of the view" from his house. He says in substance that there is a beautiful landscape in front of his house, comprising a view of the island at Bellows Falls, Fall Mountain, opposite, the river and valley above and below.

No man has any exclusive "right or privilege" to, or "interest" in, a landscape. To view and enjoy the beauty of the earth, is a privilege belonging to all God's creatures alike. Hence these words are not applicable for any such purpose. That the parties could not have had in contemplation any prospective impairment of the defendant's landscape, is apparent from the omission to use language appropriate to prevent it.

8. Conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms, and are construed strictly. 4 Kent, 129; 1 Washb. Real. Prop. 447. And like other parts of a deed, should always be construed most strongly against the grantor, "for they are his words." 2 Hill. Ab. 885, § 12; *Worthington v. Hyler*, 4 Mass. 205; *Tenney v. Beard*, 5 N. H. 58; *Mills v. Catlin*, 22 Vt. 98.

The restriction, if any exists in this clause, is personal to Shurtliff. There is no attempt made to bind his grantors or assigns. It is like a case in New Hampshire, in this respect, where a deed of warranty contained this clause: "Provided nevertheless, if the said George Simpson shall neglect to keep up and maintain forever, at his own expense, a good and lawful fence, constructed of wood or stone, on the line between his own land and land of said grantors, then this deed to be void." George Simpson died leaving his widow in possession in her own right, as well as that of guardian of a minor child of the deceased. She wholly neglected for three years after notice by the grantors, to maintain a fence. Upon a writ of entry to recover the land upon the ground of the breach of the condition, it was held, after a thorough examination of all the authorities, that this condition was personal to George Simpson, and did not attach to the land in the hands of his heirs and assigns. *Emerson v. Simpson*, 43 N. H. 475; 1 Washb. Real Prop. 447.

4. Nor can this clause be treated as a covenant running with the land. Whatever might be its operation as to Shurtliff, it does

not bind his assigns. "There is a distinction between such covenants as bind assigns, without being named, and such as require them to be named in order to charge them with their performance; and the distinction seems to be, whether the subject-matter of the covenant is *in esse* at the time or not. If it is, the covenant binds the assignee, whether named or not; if it is not, it does not bind him, unless expressly named therein." This distinction seems to have originated with *Spencer's* case, but it has always been recognized since, and repeatedly acted upon. And if the assignees are expressly named, the covenant does not run with the land, unless it affects the land itself, or the mode of its occupation. *Spencer's* case, 5 Co. 16; *Congleton v. Pattison*, 10 East, 130; 1 Washb. Real Prop. 330; *Emerson v. Simpson*, *supra*.

*L. M. Read*, for the defendant.

The orator is not entitled to the injunction prayed for in his bill of complaint.

1. The deed from the defendant to Roswell G. Shurtliff, contains two conditions, each relating more particularly to a certain portion of the premises conveyed. The second condition relates to the southern portion of the premises, and provides that "no building is to be erected on said land, which shall extend more than twenty feet southerly of the main body of the dwelling-house," &c. The first condition was intended to, and does, relate more particularly to that portion of the premises lying northerly of that point, and provides that "no building or erection is ever to be made on said land, except a dwelling-house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges, and interests, of the said Arms, or his heirs or assigns, to a greater degree than a dwelling-house and out-buildings as aforesaid would affect his and their rights, interests, and privileges. The said Arms being now the owner of a house and lands westerly of and near said premises." This deed must be so construed as to give "meaning and effect" to every part of it, and to carry out fully the intent of the parties as gathered from the whole instrument, and viewed in the light of the surrounding circumstances. *Colby v. Colby*, 28 Vt. 10;

*Flagg, Adm'r, v. Eames et als.* 40 Vt. 16; *Collins, Adm'r, v. Lavelle*, 44 Vt. 280; *Gillis v. Bailey*, 1 Post. 149.

This condition, when taken in connection with the situation of the defendant's dwelling-house, and the extensive view to be had from it in an easterly direction, and over the premises conveyed, and the effect upon the value of said house and lands erections upon the granted premises would have, plainly shows that it was the intention of the grantor to provide that nothing should be erected on the granted premises that would obstruct the view from his dwelling-house to a greater degree than a dwelling-house, &c. would obstruct such view. Yet it cannot be disputed that the erection of a dwelling-house and out-buildings, *in addition* to the church already erected on said premises, would obstruct such view to a greater degree than a dwelling-house and out-buildings *without* the church, and therefore such erection would plainly "affect the rights, privileges, and interests of the said Arms, his heirs and assigns, to a greater degree than a dwelling-house and out-buildings would affect his and their rights, privileges, and interests."

The condition in that deed is in the alternative, and permits the erection of either a dwelling-house, &c., or such other buildings, &c.

By the erection of a church on said premises, in 1858, Swett F. Brown, the grantee of said Shurtliff, made choice of the alternative provided for in that condition, and by so doing, forfeited the right to now erect a dwelling-house and out-buildings thereon. If the orator's construction of the condition in that deed is correct, and he has a right, under the deed, to erect a dwelling-house and out-buildings *and* a church, "or such other buildings," &c., then we insist that no "meaning or effect" can be given to that part of the deed, and it might better have been left entirely out of the deed.

The opinion of the court was delivered by

WHEELER, J. The clause in the deed out of which the questions made in this case arise, is in that part of the deed technically called the *premises*, and is a part of the description of the

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estate, or interest, which passed by the deed to the grantee, in the land covered by the deed. The word *conditioned*, used in that clause, does not signify that the whole estate in the land passed to the grantee, to remain there if the condition should be complied with, and to revert if it should not; nor is it a covenant, merely, that the grantee will abide by the terms of the condition; but it shows, with the rest of the description, what rights in the land passed to the grantee, and what were left remaining to the grantor. Whatever rights the grantee did take, have passed by conveyances to the orator, and nothing more has so passed, for the grantee could not convey any right that he did not have. Whatever was left to the grantor, now defendant, remains with him still. This clause is to be read together with all the rest of the deed, to ascertain from the whole instrument, what, according to the intention of the parties as collected from the instrument itself, was conveyed, and what left. In this view, the land, with the use of it restricted so that no building or erection, except a dwelling-house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges, and interests of the grantor, his heirs or assigns, to a greater degree than a dwelling-house and out-buildings for it would, passed to the grantee. The right to the restriction of the use, remained to the grantor. The grantor then owned a house and land westerly of, and near to, this land, and that fact is recited in the deed in connection with this clause, and is to be considered as a part of the situation of the parties, in connection with the recital, in construing the deed to ascertain what rights, privileges, and interests the grantor had to be affected by buildings or erections on this land. The relation of this land sold, to the house and other land mentioned, should also be considered as a part of the situation. At that time, the land sold was separated by a highway only from the other land, which was on high ground, and from the house and grounds about it there was an extensive view across the part sold. A view from a house, or from grounds about it, would be an important interest to some persons. It is probably true, as claimed for the orator, that one person has no right to control land owned by another, in any respect on account of a view; but

it is equally true that any person has a right to control and dispose of his own land as he sees fit, for the sake of a view, and is entitled to have the view protected as much as any other interest. So the defendant, when he owned this land, could, in the disposition of it, restrict its use as he saw fit, to preserve, or provide for, a view more or less unobstructed from his house and other lands, and having done so, he is entitled to enjoy the benefits of the provision. The view from his house and other lands was an interest of his, protected by the restriction. Whatever would obstruct this view more than a dwelling-house and out-buildings for the same upon this land, would be an infringement upon his rights saved to him by his deed.

A church has already been erected under the rights conveyed by the defendant's deed, and the orator seeks by his bill in this case to have the right to erect a dwelling-house and out-buildings for the same, in addition to the church, established to him. The church is a large obstruction to the view, and a dwelling-house and out-buildings for it, where the orator desires to erect them, and in the only suitable place upon the land for them, would add the size of those buildings to the obstruction. To accede to this claim of the orator, would be to enlarge the right to erect buildings no larger than a dwelling-house and out-buildings, for it would be, into a right to erect a dwelling-house, out-buildings for it, and a church. This, instead of being an establishment of the orator in a right he has already, would be establishing to him an infringement upon the rights of the defendant.

This construction of this deed does not conflict with a proper application of the rule, that a deed is to be construed most strongly against the grantor, for it only gives effect to what appears to be the fair import of the language of the deed, and that rule should never be applied to take away the effect of such import, when the import is reasonably plain from the words of the instrument.

Neither do these views conflict in any way with the decision in *Emerson v. Simpson*, 43 N. H. 475, as stated in the brief of the orator's counsel, for that was a question as to the extent of what was clearly a condition subsequent, while this is not a deed upon



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condition either precedent or subsequent to the passing of the estate conveyed.

If this clause was a covenant in the deed, it probably would run with the land, according to the rule claimed by the orator's counsel, for it would affect the mode of occupation of the land itself; but as before stated, it is not considered to be a covenant.

These considerations lead to the conclusion that the orator is not entitled to the relief asked.

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O. M. GIBBS v. GEO. W. SLEEPER.

*Account. Practice.*

A bailiff is liable for the "profits which he hath raised or made, or might by his industry or care have reasonably raised or made," out of the property of which he was bailiff. But he is not liable to account in the action of account for the property he received, but which he has not turned into profits, unless he has so disposed of it, or appropriated it to his own use, that he has consumed or wasted it as if it were his own; and that he has converted it to his own use so as to be liable for it in the action of trover, may not be a sufficient appropriation of it to make him liable in account.

When objection is made to the admission of testimony before an auditor, but no special exception to the ruling is filed in the county court, no question can be raised thereon, revisable in the supreme court.

**ACCOUNT.** The auditor reported substantially the following facts:

On the first day of April, 1870, the plaintiff was the owner of a patent-right known as "Swazey's Butter-Working Churn," with the right to manufacture and sell the same, together with the territory included in the states of New York, Pennsylvania, and Ohio. On that day, both parties then residing in Cabot, Vermont, the plaintiff employed the defendant to work for him in the business of selling said patent-right and patent churn in the states aforesaid. The contract was reduced to writing, and duly executed by the parties on the same day, and a written power of attorney was then executed by the plaintiff to the defendant. At the time these writings were executed, it was agreed and understood that either party, upon becoming dissatisfied with the other, or with the manner in which the business was being conducted, or if it

should turn out to be unprofitable, had the right at any time to put an end to the contract. In pursuance of said contract and power of attorney, the defendant commenced his service on the 4th of said April, and on that day the parties shipped from Montpelier, Vt., to Ogdensburgh, N. Y., one hundred and twenty churns, and to Mooers Junction, N. Y., forty-eight churns, and the next day the plaintiff went to Ogdensburgh, and the defendant to Mooer's Junction. From the time of their arrival in the state of New York, to the 26th of said April, the parties frequently met, and they exerted themselves to their utmost to sell both territory and churns, but with very poor success. During this time, they disposed of only three or four churns and the territory of Essex, Clinton, Franklin, St. Lawrence, and Washington counties, in New York, but it did not appear at what price they sold the territory, or how much the plaintiff realized out of said sale; but it did appear that their efforts to sell both churns and territory during this time, were far from being satisfactory to either, and that the plaintiff became discouraged with the result of their efforts, and so informed the defendant, and also informed him that he could not afford to keep him longer at the rate he was paying him. The defendant, although unsatisfied with the result of their efforts, did not want to give up the business, but desired the plaintiff to permit him to make another trial, and to that end, suggested that the plaintiff permit him to go into Tioga county, N. Y., and Bradford and Susquehannah counties, Penn., and there sell churns and territory for the plaintiff. The parties at this time were at Antwerp, N. Y., at which place they had forty-two churns in store, and one other which they had with them, and used for a sample, or model, for exhibition. At this time they made a settlement, and the plaintiff paid the defendant the sum of seventy-six dollars, which was in full payment of all matters and dealings between them up to that date, and was so understood by the parties. Within a day or two after this settlement, the plaintiff left Antwerp, and returned home, and pursuant to some arrangement previously made between them, the defendant left Antwerp about the same time for Tioga county, N. Y., and Bradford and Susquehannah counties, Penn., for the purpose of disposing of churns and territory—the churns then at Antwerp having been shipped by the plaintiff to the defendant at Owego, Tioga county, the defendant taking the sample churn along with him. At the time of said settlement, the plaintiff was released from all further liability to defendant on account of said written contract, and they mutually put an end to the same, and the trip to Tioga county, and into the state of Pennsylvania, was made by defendant under

a verbal arrangement entered into by the parties at that time, at the solicitation of the defendant, which was to the effect that the defendant should proceed to the places above named, and sell territory to the best advantage, under his said power of attorney, each party to receive one half of all the proceeds of such sales, and bear one half of defendant's expenses while so employed. The defendant was to receive the churns then at Antwerp, to be shipped to such points as he should direct, the plaintiff to pay the freight on the same, which the defendant was to sell for the plaintiff according to his best discretion, accounting to the plaintiff on settlement for what they sold for, but if, in selling territory, the defendant found it necessary to throw in a churn, he was at liberty to do so, and was to account to the plaintiff on settlement for one half of the value thereof at ten dollars, the retail price. The plaintiff then advanced to the defendant the sum of thirty dollars towards paying his half of the defendant's prospective expenses, for which the plaintiff was to have credit on a future settlement. The plaintiff delivered to defendant the forty-three churns then at Antwerp, and the same were subsequently shipped to Owego to the defendant's order. The plaintiff thereupon left for Vermont, and the defendant left for Tioga and the adjoining counties in Pennsylvania, and remained in that vicinity until some time in the fore part of July, 1870, when he returned to Cabot, and in a few days informed the plaintiff that he had made no sales of territory, and had sold but two churns, for which he received ten dollars each, and had put the remainder into some man's hands to sell, with a power of attorney to sell territory, that the man's name was S. W. Breed, or W. S. Breed, but he refused to inform the plaintiff where said Breed resided. A portion of the churns, he subsequently informed the plaintiff, were stored at Owego, but he refused to inform the plaintiff the name of the man in whose charge he left them, giving as a reason for thus refusing, and for not telling where the man Breed resided, that he was afraid the plaintiff would take possession of the churns, and revoke Breed's power of attorney, which, he said, he could not permit, as he had money and time invested as capital in the business, and he should hold on to the property until he could realize enough out of sales to get his pay. Some little time after this interview, the plaintiff called on the defendant, and requested a statement of his account of expenses and property sold, &c., during the time he was in Tioga county and Pennsylvania, which the defendant produced, and it was ascertained that the plaintiff was owing the defendant a balance of \$37.49 on account of defendant's expenses, after deducting freights which plaintiff was to

pay, and the two churns at ten dollars each, which defendant had sold, and the thirty dollars which plaintiff advanced defendant as aforesaid. The plaintiff did not approve of the acts of the defendant, and expressed himself dissatisfied with the course the defendant had taken in placing this territory and the churns in the hands of Breed to sell. The plaintiff made frequent inquiries of defendant as to how Breed was getting along, and whether he had succeeded in disposing of any churns or territory. The answer of the defendant always was, that he had done nothing yet, that it was a bad time to sell. Thus matters ran along until some time in the fall of that year, when the plaintiff again demanded that defendant should inform him where Breed resided, and where his churns were, so that he could send and get possession of them, and revoke the power of attorney held by Breed. The plaintiff was always ready and willing to pay the defendant the balance ascertained to be due him, when the defendant would give him information so he could regain possession of his churns and territory, and so informed the defendant. This proposition the defendant always refused to accede to, unless the plaintiff would pay him all his expenses, and at the rate of one hundred dollars per month for his time. The defendant never gave the plaintiff this information, but always refused so to do, and the plaintiff could never ascertain the whereabouts of Breed, or who had the churns in charge; and frequently demanded of defendant the churns, or an order for them, but the defendant always refused both. Some time before this suit was commenced, the plaintiff delivered to the defendant a paper-writing, revoking the defendant's power of attorney. The defendant, while in Tioga county and in Pennsylvania, in addition to the two churns which he sold and received the money for, delivered five churns to one Sleeper, his brother-in-law, with authority to sell the same, and he sold some, and received some money for the same, but how much, and how many he sold, did not appear. The defendant exhibited and delivered one churn to a Mr. Crane, president of an agricultural society, at said Crane's request, but never received any thing therefor. He employed a man by the name of Stephens to assist him in exhibiting and selling said churns, and delivered him one in payment for his services. He also delivered one to a man named Smith, to pay for storage of churns at Owego.

He also delivered seven to said Breed, with instructions to sell the same for him, but whether he ever sold or disposed of any of them, there was no evidence to show. The remaining twenty-six churns were left by the defendant, subject to his order, with one J. M. Smith, at Owego, N. Y.

The auditor, in stating the account between the parties, charged the defendant with the twenty dollars received for the two churns sold, and ten dollars each for the five churns left with Sleeper as aforesaid, and five dollars for one half the value of the churn delivered to Stevens for services, and the same amount for one half the value of the churn delivered to Smith for storage, and ten dollars for the churn delivered to said Crane as aforesaid, and also with the thirty dollars paid to the defendant for expenses as aforesaid; but did not charge him with the seven churns left with said Breed, or the twenty-six left with the said Smith at Owego, or with any part thereof, but referred his liability therefor to the court as matter of law. The defendant made some objections before the auditor to the admission of testimony, which were overruled; but, under the ruling of the court, it becomes unnecessary to state the particular point of the objections.

The court, at the September term, 1872, BARRETT, J., presiding, rendered judgment, *pro forma*, on the report for the defendant. Exceptions by the plaintiff.

*C. N. Davenport*, for the plaintiff.

1. There can be no question but the judgment of the county court should be reversed. The only possible doubt is, which of the sums found by the auditor the plaintiff is entitled to recover. Upon the facts found, the plaintiff should recover for the seven churns left with Breed, and the twenty-six left with Smith at Owego. The defendant's relation to the plaintiff was that of agent; he had authority to sell the churns, and, under the contract, it was his duty to account to the plaintiff for the proceeds of such as he sold, and to return to the plaintiff those unsold. He had no authority to create sub-agents. He refused to give the plaintiff any information as to where the churns were, or to return them to him, or give him an order therefor. He claimed the right to keep them until paid an unfounded claim for his services. He so conducted with the property that he is liable to account for its value.

2. Account is an action to compel a defendant to account for the property or money of which he has had the charge and ad-

ministration for the benefit of the plaintiff. It is founded either upon privity of estate, or privity of contract. Hence, the action will not lie to recover damages for a tort. 1 Swift Dig. 579. 581; *Brinsmaid, Adm'r, v. Mayo*, 9 Vt. 31. But if a person obtains possession of the goods of another through *privity of contract*, to sell and account for the proceeds thereof, if he convert them to his own use, he is liable for their value in an action of account. *Smith v. Woods*, 3 Vt. 485; *Allen v. Thrall*, 10 Vt. 255; *Kellogg v. Griswold*, 12 Vt. 291; *Scott v. Lance*, 21 Vt. 507; *LaPoint v. Scott*, 36 Vt. 603. There is a class of cases in this state, the principal of which fully sustain the plaintiff's right to a judgment. *Scott v. Lance*, 21 Vt. 508, note; *Flower Brook Mauf'g Co. v. Buck*, 18 Vt. 238; *Hickok et al. v. Stevens*, Ib. 111; *Stone v. Pulsipher et al.* 16 Vt. 428; *Catlin v. Smith*. 24 Vt. 85; *Waterman v. Stimpson*, Ib. 508; *Woodward v. Harlow*, 28 Vt. 338; *Safford v. Kingsley*, 40 Vt. 506; *Thompson v. Babcock*, Brayt. 24. At common law a bailiff is chargeable as well for what he might have received with reasonable care and diligence, as for what he has received. *Adm'r of Cilley's Estate v. Tenney*, 31 Vt. 401; *Hayden v. Merrill*, 44 Vt. 336.

*J. W. Croker and Field & Tyler.* for the defendant.

1. The plaintiff claims to recover the largest sum stated in the report. This we insist he is not entitled to recover. As to his receipts for churns sold, and as to expenses, we concede that the defendant is bound to account to the plaintiff; but we insist that he is not bound to account for the thirty-three churns unsold. 2 B. & P. 438. The right of action of account against bailiffs and receivers, does not exist by our statute, but at common law only. At common law the action lies only in three cases, to wit, against guardians, bailiffs, and receivers; and it lies only to compel an account of *profits or moneys received* by the defendant. Co. Lit. 172; 2 Greenl. Ev. §§35, 36; Anthon's Prec. 8, n. (d); 1 Swift Dig. 579. If the defendant is liable for the unsold churns in any form of action, which we deny, it is upon the ground of their conversion to his use. Account will not lie in case of a tort. 1 Swift Dig. 581; *Winchell v. Noyes*, 23 Vt. 303.

2. The defendant should not be charged with the churn left with Mr. Crane, nor with those left with Sleeper, because it does not appear that they had been sold.

The opinion of the court was delivered by

WHEELER, J. No question is made but that the defendant was bailiff to the plaintiff, liable to account to the plaintiff. As bailiff, the defendant was liable for the "profits which he hath raised or made, or might by his industry or care have reasonably raised or made," out of the property of which he was bailiff. Co. Litt. Lib. 3, § 259, note, p. 172. A bailiff is not liable to account in the action of account for the property he received, but which he has not turned into profits, unless he has so disposed of it, or appropriated it to his own use, that he has consumed or wasted it as if it were his own; and that he has converted it to his own use so as to be liable for it in the action of trover, may not be a sufficient appropriation of it to make him liable in account.

The sum of \$20, received by defendant for churns sold, was profit, about which his accountability is not questioned.

The five churns left by defendant with his brother-in-law for sale, were left there upon the defendant's own motion, upon an arrangement between him and his brother-in-law, and a part of them appear to have been sold pursuant to that arrangement, but how many were sold, was not shown to the auditor. The defendant, having disposed of these in this manner, should show how many were not sold, if there were any such. Not having done this, he should stand charged as if they were all found to be sold.

The churn delivered Stevens for services, and the one delivered Smith to pay for storage, were appropriated for the common benefit of the parties, and the defendant should stand charged for one half of them. The one delivered Crane was appropriated for the defendant's own advantage, and lost to the plaintiff, and the defendant should be charged with that. These items, together with \$30 advanced by the plaintiff to the defendant, were reckoned by the auditor against the defendant.

As to the seven churns left by defendant with Breed, and the twenty-six left with Smith, it does not appear that the defendant

has made any profit from them, nor that he might by diligence or industry have made any, nor that he has either consumed, wasted, or disposed of them as his own, and he is not liable to be charged for them in this accounting. This appears to be according to the statement of the accounts made by the auditor.

No special exception to the ruling of the auditor in admitting testimony, was filed in the county court, therefore, no question was raised upon that ruling that is revisable here.

Judgment reversed, and judgment for the plaintiff on the report according to the report.

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THE TOWN OF JAMAICA v. THE TOWN OF WARDSBORO AND THE  
TOWN OF TOWNSHEND.\*

*Highways. Jurisdiction of the County Court under § 65, ch.  
24, of the Gen. Stat.*

Under § 65, ch. 24, of the Gen. Stat. (which provides that, "when any town shall deem itself oppressed by being required to build, make, or put in repair, any bridge or road, locate or laid out by the county or supreme court, in or through such town, which is evidently for the accommodation of other travel than that of the inhabitants of such town, the selectmen of such town may make application to the county or supreme court, for remedy"), the county court has jurisdiction to appoint commissioners, and compel towns benefited by a road already laid out and built, to contribute to the expense of maintaining and keeping the same in repair.

THIS was a petition under § 65, ch. 24, of the Gen. Stat. The allegations of the petition are fully stated in the opinion. The defendants moved to dismiss the petition, for reasons apparent upon the face thereof, and because the county court had no jurisdiction to appoint commissioners according to the prayer of the petition. The court, at the September term, 1871, Ross, J., presiding, dismissed the petition; to which the petitioner excepted. At this term, the petitioner preferred his petition to this court for a writ of *mandamus*; and the exceptions and petition were heard together.

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\* This case was decided at the February term, 1872.



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Jamaica v. Wardsboro and Townshend.

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*Waterman & Read*, for the petitioner, cited Gen. Stat. 185, § 65; *Pomfret v. Hartford*, 42 Vt. 134; *Wardsboro et al. v. Jamaica*, 27 Vt. 470.

*Charles N. Davenport*, for the defendants, cited Gen. Stat. ch. 25, § 1; *Pomfret v. Hartford*, *supra*.

*A. Stoddard*, for the town of Townshend, cited Gen. Stat. ch. 24, § 65; *Hutchinson et al. v. Chester*, 33 Vt. 410.

The opinion of the court was delivered by

ROYCE, J. The town of Jamaica brought a petition against the defendant towns, returnable to the September term of Windham county court, 1871, setting forth that on the 4th Tuesday of September, 1848, a highway was laid out in said town by a committee appointed by the county court; that the report of the committee was accepted, and the town was ordered to make the highway, and that they had made it, and had ever since kept it in repair; that said highway is mostly used by the inhabitants of the defendant towns, is but little used by the inhabitants of Jamaica, and is evidently for the accommodation of the travel of the defendant towns; and that the town of Jamaica deemed itself oppressed by being required to put and keep in repair said highway; and praying that the defendant towns might be ordered to pay their just proportion of putting and keeping it in repair.

The defendant towns moved to dismiss the petition, for reasons apparent upon the face of the petition, and because the court had no jurisdiction to appoint commissioners. The court dismissed the petition upon said motion, allowed exceptions, and passed the cause to this court. The town of Jamaica also brought a petition for a writ of *mandamus*, returnable to this term, and both cases were heard together.

Whether the court erred or not in dismissing the petition, must depend upon the construction to be given to the act of 1847, which is embraced in § 65, ch. 24, of the General Statutes. The language of the statute is: "When any town shall deem itself oppressed by being required to build, make, or put in repair, any

bridge or road, located or laid out by the county or supreme court," &c. It is claimed by the defendant towns that this statute has reference, and is only applicable to, cases where some new requirement is made upon the town, and does not apply to the ordinary repairs which towns are obliged by law to make upon their highways. But we do not think the statute should be so construed; but that the word *put*, as it is used in the statute, is synonymous with *keep*; and when it is thus used, there can be no doubt what is meant by it. The legal obligation of towns is fulfilled if they *put* their highways in repair when repairs are required; and if this is done, they are *kept* in repair. It is the duty of courts so to construe statutes as to meet the mischief, and advance the remedy. Previous to the act of 1847, the whole burden of building and maintaining highways, was thrown upon the towns in which they were situated, regardless of the benefits derived by inhabitants of adjoining towns; and to remedy this, that act was passed. We think the intention of this statute was, to provide a way by which towns once in five years might compel an equitable distribution of the burden of building and maintaining such highways and bridges, among towns whose citizens are benefited by them; and this, we understand, is the construction which was put upon the statute in *Pomfret v. Hartford*, 42 Vt. 134. We think the court erred in dismissing the petition; and inasmuch as no question has been made as to the manner in which the case comes here, we reverse the judgment, and remand the case to be proceeded with in the county court the same as if the motion to dismiss had not been interposed; and the petition for a writ of *mandamus* is dismissed, without costs and without prejudice.

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 Johnsons v. Mussy.
 

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## URI JOHNSON AND ELON G. JOHNSON v. ABIJAH MUZZY.\*

*Covenant.*

An action of covenant for rent will not lie against a lessee where the lease is a deed-poll, signed by the lessor only, although the lessee may have accepted the lease, and occupied and held under it during the full term, without paying the rent reserved. Peck, J., dissenting.

In an action of covenant the declaration alleged that, on the 7th of March, 1841, the plaintiff, by deed duly executed, conveyed a certain farm to the defendant, reserving to himself the fruit of the orchard for ten years and that the defendant, in and by said deed, covenanted to keep the orchard well fenced, and to preserve it from depredation by cattle, &c. Pleas, *non est factum*. The defendant accepted said deed, and possessed and held under it, but it was signed and sealed by the plaintiff only. Held, that it was not, in legal contemplation, the deed of the defendant, and that covenant would not lie. *House v. Foster*, Washington county, 1862, cited by ROYCE, J.

COVENANT for rent. Pleas, *non est factum*, accord and satisfaction, and offset. That part of the declaration which was furnished to the reporter, recited, "that whereas, on &c., at &c., the defendant held certain notes against the said Elon, originally payable to one E. G. Shumway, and another note secured by mortgage on the saw-mill hereinafter mentioned; and whereas the said plaintiffs, on &c., at &c., by a certain indenture then and there made between the said plaintiffs of the one part, and the said defendant of the other part, sealed with their seals, the date whereof is," &c. At the trial, the plaintiffs offered in evidence the lease described in the declaration, which was signed and sealed by the plaintiffs only, and duly acknowledged and recorded, whereby the plaintiffs demised and leased unto the defendant the premises described in the declaration, situate in the village of Jamaica, for the term of two years, reserving one hundred and fifty dollars rent for the first year—whereof thirty dollars was to be paid by the defendant to one Livermore, and the balance to be indorsed on the said Shumway notes—and two hundred dollars for the second year, to be indorsed on the other note held by the defendant as aforesaid; and whereby "the said Muzzy agrees to pay said rent in manner aforesaid, and to deliver up said premises and property at the end of said term, in as good condition as the same now are, reasonable wear and tear thereof, and fire and other casualties, excepted." The plaintiffs also of-

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\* This case was tried at the February term, 1872.

ferred to prove that the defendant accepted said lease, and entered into possession of the premises therein described, thereunder, and occupied the same during the full term thereof, and had never paid the rent in the manner therein named, or otherwise. To all the testimony thus offered, the defendant objected, and the court excluded the same; to which the plaintiffs excepted. The plaintiffs offered no further evidence, and rested their case. The court, at the September term, 1871, Ross, J., presiding, rendered judgment for the defendant; to which the plaintiffs also excepted.

*Waterman & Read*, for the plaintiffs, cited Co. Lit. 229 a, 231 a; Lit. §§370, 374, 666, 667; Shep. Touch. 177; Cro. Jac. 240, 399, 512; *Brett v. Cumberland*, 1 Roll. Rep. 359; 2 Ib. 63, 159; 3 Bulst. 163, 164; 38 Edw. 3, 8 a; 45 Ib. 11, 12; Finch's Law, 109; Vin. Abr. Covenant, B. pl. 1, 1 a, 2; Cruise Dig. 447, §§3, 4; Bac. Abr. Covenant, A.; 1 Roll. Abr. 517, pl. 40; 2 Jacob Law Dict. 120; Com. Dig. Covenant, A. 1, B. 3; Dyer 13 c. pl. 66; Petersd. Abr. Covenant, A.; 1 Selw. N. P. 109; 1 Chit. Pl. 109; 1 Swift Dig. 354, 571; 2 Washb. Real Prop. 588, 589, §48; *Staines v. Morris*, 1 Ves. & B. 14; *Wilkins v. Fry*, 1 Meriv. 265; *Burnett et als. v. Lynch*, 5 B. & C. 589; *Finley v. Simpson*, 2 Zab. (N. J.) 311; Platt Cov. 81; *Kimpton v. Walker*, 9 Vt. 191.

*A. Stoddard*, for the defendant, cited 2 Bouv. Law Dict. 385; 1 Chit. Pl. 115, 119; 2 Bac. Abr. 560; 1 Esp. N. P. 266; *Berkeley v. Hardy*, 5 B. & C. 355; *Burnett et als. v. Lynch*, Ib. 589; *Gale v. Nixon*, 6 Cow. 445; *Ludlow v. Wood*, 1 Penn. 55; *Bilderbuck v. Powner*, 2 Halst. (N. J.) 64; *Tribble v. Oldenham*, 5 J. J. Mar. (Ky.) 137; *Trustees, &c. v. Spencer*, 7 Ohio, 149; 2 Washb. Real Prop. 589; *Hinsdale v. Humphrey*, 15 Conn. 431; *Kempton v. Walker*, 9 Vt. 191; *Shaw, Adm'r, v. Partridge*, 17 Vt. 626; *University of Vermont v. Joslyn*, 21 Vt. 52.

The opinion of the court was delivered by

ROYCE, J. This is an action of covenant, brought to recover for the rent of certain premises situate in the village of Jamaica.

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Johnson v. Mussy.

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The declaration alleges that the plaintiffs and the defendant made a certain indenture, dated the 20th day of August, 1862, which was sealed with their seals, and that in and by said indenture, the defendant, among other things, covenanted and agreed to pay the rent, for the recovery of which this suit is brought.

The defendant pleads *non est factum*. The plaintiffs offered in evidence the lease of the premises described in the declaration, accompanied with the offer to prove that the defendant accepted the lease, entered into possession of the premises under it, and occupied the same during the full term named therein, and had never paid the rent.

It appeared from the lease that it was signed, sealed, and acknowledged by the plaintiffs, and recorded in the town clerk's office in Jamaica, on the 20th day of August, 1862, but had never been signed or sealed by the defendant; and upon the objection of the defendant, it was excluded. The only question reserved was as to the correctness of this ruling.

The general rule is, that covenant will lie only where the instrument is actually signed and sealed by the party, or by his authority. But it is claimed by the plaintiffs that there are exceptions to this rule, and that this case comes within one of them. In 1852, the case, *Israel House v. Wm. Foster*, was heard and decided by the supreme court in Washington county.

That was covenant, and it was alleged in the declaration that on the 7th day of March, 1841, the plaintiff, by a deed duly executed, conveyed to the defendant a certain farm, reserving to himself the fruit of the orchard for ten years, and that the defendant in and by said deed, covenanted to keep the orchard well fenced, and to preserve it from depredation by cattle, &c.; and it appeared that the defendant accepted the deed, and possessed and held under it. The plea was *non est factum*, and the deed when produced in evidence appeared to have been signed and sealed by the plaintiff only. The court held that it was not, in legal contemplation, the deed of the defendant, and that covenant would not lie.

This case has never been reported, but I have the manuscript of the opinion delivered by Judge ROYCE, and have been thus

particular in stating its facts, for the reason that it seems to me that there is such an analogy between that case and the one under consideration that we cannot reverse the ruling in this, without virtually overruling that. But, if this is to be regarded as still an open question, we are unable to find that the plaintiffs have brought themselves within any recognized exception to the rule as above stated. That the defendant by accepting the lease and holding under it, incurred an obligation to perform the acts therein stipulated to be performed for the lessor's benefit, cannot be disputed. But did he *covenant* to perform them? Much of the confusion to be found in the books upon this subject, is, in my judgment, attributable to the loose manner in which the proposition is stated, and the apparent neglect in examining the authorities from which it is derived. The cases cited in the English books as authorities for the rule claimed by the plaintiffs, I think will all be found to have depended upon some custom, like the custom of London, where an action of covenant lay without a specialty. 22 Edw. 4, 2 a. Or, where the defendant derived title under a grant or patent from the crown. *Brett v. Cumberland*, Cro., Jac. 399, 521; Com. Dig. Covenant, A. 1; Vin. Abr. Covenant, A. 1.

The only case which I have been able to find in the English reports, which can be claimed as an authority for the extension of the rule beyond what is above indicated, is *Burnett et al. v. Lynch*, 5 B. & C. 589. In that case, the lessee by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under the assignment, and before the expiration of the term, assigned to a third person. The lessor sued the lessee for breach of covenant committed during the time that A. continued assignee of the premises, and recovered damages against him. The lessee brought an action upon the case, founded in tort, against A., for having neglected to perform the covenants during the time he continued assignee, and the question was, whether the action would lie, and it was held that it would. ARBOTT, C. J., in the opinion says: "I think an action of covenant is not maintainable,

for an action of covenant is of a technical nature. It cannot be maintained, except against a person, who, by himself, or some other person acting in his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those mentioned in Co. Lit. 231 a) has agreed by deed to do a certain thing." It will be seen by reference to the *Year Book*, 38 Edw. 3, 8, a, from which the note in Co. Lit. is extracted, that the form of action in that case was debt, and as applicable to that form of action, there is no doubt that it is sound law. But the error has been, wherever this authority has been cited, in a misapprehension of the form of action.

In *Hinsdale v. Humphrey*, 15 Conn. 433, it was held that an action of covenant would not lie against a lessee, or his assignees, for rent under a lease sealed by the lessor only, and that the acceptance of such a lease by the lessee, is not such an assent to the stipulations contained therein as to make it his deed; and the same doctrine was held in a well considered case reported in the 7th Ohio; and in *Goodwin v. Gilbert*, 9 Mass. 510, and in *Gale v. Nixon*, 6 Cow. 445, the court says that a recognition of the contract, though in writing and under seal, will not make it a covenant. We have seen but one American case where a contrary doctrine has been held, and that is *Finley v. Simpson*, 2 Zabriskie, 311. So that, upon principle and authority, we think the ruling was right, and the judgment is affirmed.

PECK, J., dissenting.

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## THE TOWN OF LONDONDERRY v. THE TOWN OF PERU.\*

*Highways. Certiorari.*

The questions, whether a town in the vicinity of the town in which a road is laid, will be specially benefited by such road, and whether the part of the expense of building the road, which is apportioned to such town, is just and reasonable, are matters of fact, exclusively within the jurisdiction of the commissioners and the county court. It rests in the discretion of the court to grant or refuse the writ of *certiorari*, and it devolves upon the party applying for the writ to show that injustice has been done, and that it may be remedied if the writ is awarded. After a road has been built, so that the amount of the part of the expense of building apportioned to a town can be ascertained, the county court may order the town to pay the specific sum, and issue execution therefor.

PETITION for a writ of *certiorari*. This petition alleged, among other things, that at the June term, 1868, of Bennington county court, D. L. Kent and others, preferred their petition against the town of Peru, in said county, praying for the laying out of a public highway in said town; that the court at said term appointed commissioners to examine and report in the premises, and continued the case to the December term, 1868; that at the June term, 1871, said court ordered and adjudged that the "town of Londonderry be assessed for the building of this road, the sum of five hundred dollars, to be paid within sixty days, or execution to issue;" and prayed "that a writ of *certiorari*, or *mandamus*, or other appropriate remedy, in the discretion of the court, may issue, that the files and proceedings of said county court, and the records of said cause, may be certified to this court, to the end that they may be inspected, and your petitioner have such relief in the premises as to law and justice may appertain." All the other allegations of the petition are stated in the opinion.

C. N. Davenport, for the petitioner.

The proceedings of the county court were erroneous, in that the road was ordered to be opened and built, a commissioner appointed and authorized to expend the money necessary to build

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\* This case was decided at the February term, 1872.



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Londonderry v. Peru.

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the road, before it was determined that Londonderry was liable to contribute. The court should first have determined what towns, if any, should assist Peru in bearing this burden. Londonderry had a right by statute (Gen. Stats. c. 24, s. 59, *et seq.*) to appear and resist the acceptance of the report, by showing any facts relevant to the question; and when the court deprived that town of opportunity to show the facts in support of the exceptions filed, until the road was completed, they clearly erred. No. 9, acts of 1868.

The court erred in adjudging that "Londonderry be assessed for the building of this road, the sum of five hundred dollars." Neither the commissioners or the court have a right to assess a specific sum. The commissioners' duty is to ascertain the *proportion* of the expense which each town specially benefited ought to pay; and the duty of the county court is to accept or reject the report *as made*, and if accepted, then "such court may thereupon assess the town or towns so benefited, according to such report." That this is the correct view of the matter, will be apparent upon examination of secs. 58 to 68 inclusive, of ch. 24, Gen. Stat.; *Rockingham et al. v. Westminster*, 24 Vt. 288; *State v. Williston et als.* 81 Vt. 153, 158; *Pomfret v. Hartford*, 42 Vt. 134. The last named case is a full authority to the point that such an order must be *prospective*, having relation only to expenses *yet to be incurred*, or it is illegal.

The court also erred in ordering execution to issue. The county court has no power to issue execution in this class of cases. Their duty is to determine what proportion of the expenses the contributing towns ought to bear. The town in which the road is located then proceeds to build the road, unless the court in its discretion, upon the application of some town interested as a party, shall appoint a commissioner. When built, the town, or the commissioner, may call upon the towns contributing to pay (in the language of the act of 1868) "such town's assessment in due and ratable proportions," and if the towns refuse to pay, a perfect remedy exists by suit. No. 9, acts of 1868; Gen. Stats. c. 24, secs. 60, 65, 67; *Brookline v. Westminster*, 4 Vt. 224; *Rockingham v. Westminster*, *supra*. Independently of the

statute, there is no liability on the part of one town to contribute to the expenses of roads and bridges in another. This liability is *stricti juris*, and it is the right of a town when asked to contribute, to require the statute provisions to be strictly complied with. *State v. Williston et als. supra*; *Pomfret v. Hartford, supra*.

There is no doubt, I apprehend, but this petition is the appropriate remedy. Its object is to bring the records and proceedings of the inferior court here for revision. Whether this is done by *mandamus* or *certiorari*, is of no importance. *Rockingham v. Westminster, supra*; *Rand et als. v. Townshend*, 26 Vt. 670; *Woodstock v. Gallup*, 28 Vt. 587; *Hutchinson et al. v. Chester*, 33 Vt. 410; *Pomfret v. Hartford, supra*.

We are aware that this court exercise a discretion in the matter of issuing writs of *certiorari* and of *mandamus*, and that it should be made to appear that some substantial wrong or injustice has been done, to entitle a party to this relief; and we think the record shows that substantial injustice has been done in the following particulars at least:

1. In effect depriving the petitioner of its day in court, by accepting the report and procuring the road to be built before the case as to the petitioner was heard.

2. By the order that the town should pay a specific sum of \$500 to defray the expenses of a road already built, instead of fixing a proportion of the expenses of a road yet to be built.

3. By wrongfully and illegally subjecting petitioner to final execution—a process hard to defend against.

4. If it be allowable for this court to consider the evidence filed in the court below, it will be found that there is not a scintilla of evidence to show that any inhabitant of Londonderry derives any benefit from the building of this road, but the contrary affirmatively appears. It is certainly not asking too much of the court to invite them to look at the proofs before they decide that substantial injustice was not done below.

All the proceedings of the court below in this case, as respects Londonderry, should be vacated and set aside.

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Londonderry v. Para.

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A. L. Miner,<sup>3</sup> for the petitionee.

This writ is never awarded in this state to revise matters of fact. All questions of fact as to the necessity of the road, who are to be accommodated, &c., are questions exclusively for the commissioners and the county court. *Paine v. Leicester*, 22 Vt. 44; *Woodstock v. Gallup*, 28 Vt. 587. The question, whether other towns in the vicinity are to be benefited by making the road, is also a question of fact, and should be no more revised by this court than the question as to the necessity of the road. The question, whether Londonderry will be benefited by the road, is a fact settled by the commissioners and the county court.

It is claimed that the county court, in assessing Londonderry in the specific sum of five hundred dollars, instead of the one eighth of the \$4,000, estimated by the commissioners, transcended the authority given it by statute. We think, by the statute, commissioners or the county court may order specific sums paid by towns in the vicinity. Gen. Stats. 186, § 67; *State v. Woodbury*, 27 Vt. 731. In that case, both Montpelier and Hardwick were assessed in specific sums.

In the case at bar, the commissioners estimated the whole expense of the road at \$4,000, and assessed Londonderry one eighth, after hearing. The report of the agent appointed to expend the money, &c., shows that he paid for constructing the road \$5,500, and that his own services and expenses were \$——. So in fact the county court diminished the amount apportioned to Londonderry from one eighth the expense of making the road to one eleventh, making about \$200 in favor of Londonderry. They cannot complain of injustice in this.

This court has a discretionary power whether they will order the writ to issue; and never grant it, unless the proceedings below are clearly contrary to law. *Lyman v. Burlington*, 22 Vt. 131; *Pamfret v. Hartford*, 42 Vt. 134.

The opinion of the court was delivered by

ROYCE, J. This was a petition for a writ of *certiorari*, to bring up the files and records remaining in the county court, in a proceeding in which D. L. Kent and others were petitioners, and the

towns of Peru, Dorset, Landgrove, and Londonderry were defendants. The object, purpose, and history of that proceeding, are stated in the petition, and the only evidence upon which the petitioner predicates his right to the writ, is contained therein. Counsel in argument have assumed the existence of certain facts which are not alluded to in the petition, and about which there has been no evidence. Treating the petition as true in all particulars, what is the case made? The report of the commissioners laying out and establishing the highway in question, was returned to the December term of Windham county court, 1868. The commissioners estimated the cost of making the road (exclusive of the damage to land-owners and the costs of the proceeding) at the sum of \$4,000; and they also reported that, in their opinion, the town of Peru would be excessively burdened by defraying all the expense of said road, and that they deemed that the towns of Dorset and Landgrove, in Bennington county, and the town of Londonderry, in Windham county, would be specially benefited by said road; and did, therefore, apportion and adjudge that the town of Dorset should pay one fifth of the expense of building said road (exclusive of land-damages and costs); the town of Landgrove seven fortieths; the town of Londonderry one eighth; and the town of Peru the remainder. The town of Londonderry excepted to the report of the commissioners, and the grounds of exception were:

1st. That that town would not be specially benefited by the building of the road.

2d. That the portion of the expense of building said road apportioned to said town, was not just and reasonable.

The report seems to have been accepted, and the case disposed of as to all the towns except Londonderry, at the December term of the court, 1868; and as to that town, final judgment was rendered against the town at the June term, 1871.

In passing upon the question whether the writ should be awarded, the court will first inquire if any injustice has been done to the petitioner. It is not claimed but that the court had jurisdiction of the parties and of the subject-matter. The questions involved in the exceptions to the report being matters of

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Londonderry v. Peru.

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fact, were within the exclusive jurisdiction of the commissioners and the county court, and the judgment of the county court must be regarded as conclusive upon those questions. *Paine v. Leicester*, 22 Vt. 44; *Woodstock v. Gallup*, 28 Vt. 587.

We are not to assume that injustice has been done, but the burden of proof is upon the party applying for the writ to show that it has been done, and that it may be remedied if the writ is awarded. The writ is not demandable as a matter of strict legal right, for it is well settled that it rests in the discretion of the court to grant or refuse it. *Lyman v. Burlington*, 22 Vt. 131; *Pomfret v. Hartford*, 42 Vt. 134.

It is claimed that the court erred in ordering execution to issue against Londonderry in sixty days, if the sum assessed against said town should not be paid. It is not stated in the petition whether the highway had been built at the time the order was made or not; but the presumption is that it had been, for if it had not, the court would not have been justified in making an order for the payment of a specific sum. Until the highway had been built, it could not be ascertained what one eighth part of the expense of building it would amount to. The court having the means whereby it could legally fix the amount which the town should pay, and having fixed it, the town is thereby concluded, and the amount having thus been rendered certain, it was competent for the court to order the ordinary process of execution to enforce its order. If the amount still remained in doubt, or subject to be litigated, it would have been proper that the town of Peru should have sought its remedy by action, as was done in *Brookline v. Westminster*, 4 Vt. 224.

But the order in this case had the conclusive, binding force of a judgment, and there are no such facts shown, as, in our judgment, would justify the awarding of the writ. Consequently, the petition is dismissed with costs.

## SETH OAKES v. JOSEPH P. WESTON.

*Evidence.*

In case for injury to the plaintiff's horse, occasioned by the defendant's overloading and overtasking it in drawing a load of ashes with it and another horse, from C. to R., it was held, that the plaintiff could not ask witnesses who had previously drawn ashes over the same route, and who drew ashes in company with the defendant on the day of the alleged injury, and had testified as to the condition of the road that day, and as to the weight of the defendant's load, and that they were acquainted with the horses the defendant had, and knew about his wagon,—whether, in their opinion, the defendant's horses were unreasonably loaded, and what would have been a reasonable load, under the circumstances.

CASE for injury to the plaintiff's horse. Plea, the general issue, and trial by jury, September term, 1872, BARRETT, J., presiding.

In December, 1868, the plaintiff loaned his horse to the defendant to go from the defendant's residence, in Rockingham, to Cavendish, a distance of sixteen miles, after a load of ashes. The defendant put said horse beside another, and went with a wagon, there being but little if any snow. Haskell I. Wiley, Frank Proctor, and Eli B. Pulsipher, went with two-horse teams after ashes the same day, to the same place. They had each previously drawn ashes from the same place to the defendant's neighborhood. They each knew the condition of the road that day, and each drew home a load of ashes; and were in company with the defendant during the day. The plaintiff claimed, and his evidence tended to show, that the road was hilly in places, and the grade somewhat steep, and its condition unfavorable for traveling, and heavy loads; that the ashes were in barrels, and had been exposed to the rain for a long time, and were saturated with water to the bottom of the barrels, and frozen some; that the defendant loaded twelve barrels of said ashes, which witnesses estimated to weigh not less than three hundred pounds each, on to his wagon, and started for home; that he had much difficulty in drawing his load, on account of its weight; that some of the way the horses were unable to draw it, and that Wiley, Proctor, and Pulsipher, each in turn, helped with their horses. The plaintiff's evidence

also tended to show, that the plaintiff's horse was worth \$200 when the defendant took it, and was sound and well, and had never shown any signs of weakness or disease across the back, or about the spine, and that there was no difficulty with its kidneys and urinary organs; that the defendant was on the road from early morning till late in the evening, and that the plaintiff's horse was ever after so weak across the back that it interfered with its traveling, and rendered it useless for a work-horse, and that said weakness resulted in a disease of the spine and kidneys, of which the horse ultimately died.

The defendant conceded that the horse was sound and well when he took it, but his evidence tended to show that the difficulty and disease about the spine was not caused by overloading, or improper use by the defendant, and that the horse died of a disease called the *blind staggers*.

The plaintiff claimed that the defendant overloaded the horse, and overtasked it in drawing the load, and did not exercise the prudence and care that a prudent man would under such circumstances; and his evidence tended to show that Wiley told the defendant when he had loaded ten barrels, that he had got on all he ought to draw. The plaintiff propounded to Wiley, Proctor, and Pulsipher, after eliciting from them that they were acquainted with the horses, knew about the wagon, the road, its condition that day, and that they each had been accustomed to teaming, and had had some experience in drawing ashes from the same place a few days before, over the same road, and had handled them, and knew about their condition—the following question: “Whether in your opinion his (defendant's) horses were unreasonably or improperly loaded, and what would be a reasonable load for that span of horses, with that wagon, and the condition of the going as it then was?” The question was objected to by the defendant, and excluded by the court; to which the plaintiff excepted. Verdict for defendant.

*L. S. Walker*, for the plaintiff, cited *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 Vt. 499; *Clifford v. Richardson*, 18 Vt. 620; *Cavendish v. Troy*, 41 Vt. 99.

*Chas. N. Davenport*, for the defendant, cited *Lester v. Pittsford*, *supra*; *Davis v. Fuller*, 12 Vt. 178; *Clifford v. Richardson*, *supra*; *Linsley v. Lovely*, 26 Vt. 123, 136; *Fraser v. Tupper*, 29 Vt. 409; *Cram v. Cram*, 33 Vt. 15, 18; *Fairfield et al. v. Bascomb et al.* 35 Vt. 398, 412; 1 Greenl. Ev. §440; 1 Phill. Ev. 290; Cowen and Hill's notes, 529, 759; 1 Smith Lead. Cas. 286.

The opinion of the court was delivered by  
| Ross, J. The opinion of the witnesses, sought to be elicited by the plaintiff's inquiry as to whether the defendant improperly and unreasonably loaded the plaintiff's horse on the occasion when it was claimed that it received an injury, does not fall within any of the exceptions to the general rule that witnesses must state facts, and not opinions, known to the court. | The witnesses were not experts in the ordinary acceptation of that term. It was proposed by the plaintiff to elicit the opinion of the witnesses on the very point which was in controversy between the parties, and which it was the province of the jury to try and determine, under instructions from the court. The witnesses had described the condition of the road in regard to hills and muddiness, the weight of the load, the difficulty the horses had in taking the load up the hills, and the length of time the horses were put to continuous labor. The case in respect to the admissibility of the opinion of witnesses who observed the facts from which they were to draw their opinion, is not distinguishable from *Lester v. Pittsford*, 7 Vt. 158, and *Fraser v. Tupper*, 29 Vt. 409. In both those cases, it was held that the witnesses could not be allowed to give an opinion as to the result or effect of the facts observed and testified to by them. This case does not fall within any of the exceptions to the general rule excluding witnesses from giving an opinion, stated by the court in those two cases.

Judgment affirmed.



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 Smith v. Smith.
 

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## SAMUEL SMITH v. LUCIUS SMITH.

*Assumpsit. Contract. Enlargement of the Time of Performance specified in a sealed Instrument, by parol Agreement. Waiver of Time of Performance. Damages. Recoupment.*

Where the time for the performance of a contract on the part of the plaintiff, specified in a sealed instrument, is enlarged by the parties by parol agreement, the form of remedy is assumpsit, and not covenant, or other action counting upon the contract as under seal.

The plaintiff contracted with the defendant, under seal, to build a highway in the town of S., (which was laid out for the special accommodation of the defendant, and which the defendant had contracted with S. to build), and to complete it, ready for the acceptance of the agents of S., within a specified time; but he did not complete it within the time. The defendant did not enlarge the time of performance, but suffered the plaintiff to proceed with the work after the expiration thereof—urged him to sublet a portion of it, which he might have done,—remonstrated against his delay,—notified him that he should claim damage therefor,—and was present on different occasions when the agents of S. accepted some portions of the road, and made no objection thereto, although some part of the road so accepted was built after the time of performance had expired. *Held*, that the defendant thereby waived his right to object that the plaintiff could not recover at all, because he had not performed the contract within the time, but that he was not thereby barred from insisting upon a deduction from the contract price on account of damage occasioned by the delay.

By the terms of said contract, the defendant was to pay the plaintiff one hundred dollars of the contract price, on the completion, and acceptance by said agents, of each one hundred rods of the road, and the balance on the completion and acceptance of the whole road. When this suit was commenced, a portion of the road had been accepted, and the remainder was completed in the manner required by the contract, but said agents had refused to accept the same, although they had had reasonable time and opportunity to do so. *Held*, that the plaintiff was not precluded from recovering for building that portion of the road not accepted, because of the wrongful refusal of said agents to accept it.

The defendant rented his house, situate on the line of said road, to a tenant, who relied upon the road's being completed according to said contract; and in consequence of the plaintiff's failure to complete it, the defendant was compelled to deduct from the stipulated rent. *Held*, that the damage thus sustained was too conjectural and remote for allowance.

In consequence of the failure of the plaintiff to complete said road within the time stipulated, the defendant was compelled to construct a winter road for his use. *Held*, that the cost of constructing said road was a proper item of damages to be recouped by the defendant.

THIS was an action of general assumpsit, commenced on the 2d day of August, 1871. The case was referred, and the referee reported the following facts:

The defendant invested from ten to twelve thousand dollars in timber lands, and in the erection of a house, barn, mills and ma-

chinery thereon, about two miles and a half from the county road, down the Deerfield River, in Stratton, relying upon the assurances of leading men of the town that a public highway should be laid thereto. The town subsequently voted to build said highway, and on the 20th of October, 1868, the defendant contracted with the town to build the same, and on the 20th of May, 1869, he sublet the building thereof to the plaintiff, by contract under seal; whereby the plaintiff agreed to build the road as therein specified, in a thorough and workmanlike manner, and complete the same ready for acceptance by the agents of the town appointed for that purpose, before the first day of October then next; and whereby the defendant agreed to pay the plaintiff three dollars per rod for building said road, one hundred dollars thereof to be paid on the completion, and acceptance by said agents of the town, of each hundred rods of road, and all the balance thereof, on the completion, and acceptance by said agents, of the whole road; and whereby, also, each party agreed to pay the other all actual damages arising by reason of their non-fulfillment of said contract.

Said road was laid out and built for the especial accommodation and benefit of the defendant.

The plaintiff began work under said contract in June, 1869, but, by not employing sufficient help, and by suspending work to attend to his farm work, at the time when by the terms of his contract the entire road should have been completed, he had completed only one hundred rods thereof, though he had cut the timber and done some work on other parts of the route. The selectmen, who were agents for that purpose, accepted the one hundred rods thus completed, some time in the fall of 1869, up to which time the defendant had paid the plaintiff on said contract the sum of \$128.07. In November, 1870, the selectmen accepted two hundred rods more of the road that the plaintiff then claimed was completed, though they and the defendant protested to the plaintiff that it was not constructed in a thorough and workmanlike manner. The defendant had then paid the plaintiff on said contract, the sum of \$841.50. November 8, 1870, the plaintiff claimed that the remaining 478 rods of the road were completed according to the contract, and took off his teams; but the selectmen refused to accept this part of the road. May 6, 1871, the selectmen went upon the road with the parties, and indicated by stakes and memoranda, what further work they required, and on the 31st day of August following they were upon the road again, but finding that only a part of the work indicated by them had been done, again refused to accept said remaining part of the road. On the 7th of September after, the selectmen examined the road again,

and found it then not fully completed, but accepted it, upon the defendant's assurance that he would complete it according to their requirements made on the 6th of May, and filed the survey thereof in the town clerk's office, and the road was opened to the public.

After the selectmen declined on the 31st of August as aforesaid to accept the remaining 478 rods of road, the plaintiff notified the defendant that he should do no more work upon the road, insisting that it was done according to contract, and told the defendant if it was not complete, he might finish it; and the defendant did finish it soon after the 7th of September aforesaid, at a cost of forty-one dollars.

At the commencement of the trial, the defendant's counsel insisted that the action of covenant was the only proper action, and that this action of assumpsit could not be maintained; and, also, that no action could be maintained until the plaintiff's contract was completed, and the road accepted by the selectmen. The defendant's specification was offered and received as showing payments upon said contract for work, and not in offset to the plaintiff's specification. The defendant offered evidence tending to show, that though said road was accepted by the selectmen, it was not built in thorough and workmanlike manner as required by the contract, and that he suffered damage in consequence thereof, which he claimed should be recouped. The defendant also offered evidence tending to show that he suffered special damages in consequence of the road not being completed within the time specified in said contract, which he claimed should be recouped. The road was built in the manner required by the plaintiff's contract, with the exception of the two hundred rods accepted Nov. 8, 1870, which portion was not so built, in that the stumps and roots of trees were not removed from the road-bed. The referee reported that it was impossible for him to compute the damage this deficiency caused to the defendant, or how much less the road was worth for his purposes on that account; but found that it would have been worth one hundred dollars more to have brought that portion of the road up to the requirements of the contract. The defendant did not extend the time for the plaintiff to build the road, though he suffered him to proceed with the work after the expiration of the time specified in the contract, but urged him to underlet a part of the road to others, which he might have done, remonstrated against his delays, and notified him he should claim damages in consequence thereof.

In consequence of the road not being completed within the time specified in the contract, the defendant, in the winter of 1869-70,

was obliged to cut a winter road over a part of the route for his use that winter, and the labor of so doing was worth \$23. The defendant was obliged to use, and did use, the road as fast as it was made passable.

In 1869, the defendant rented his house to one Hubbard, who relied upon said road being completed according to said contract; but on account of its not being completed, the defendant was obliged to discount to him fifty-two dollars, which was one half of the agreed rent. The defendant was present on the different occasions when the selectmen accepted the road as above stated, and made no objection to such acceptance.

The referee found a balance due the plaintiff of \$1,128.77, subject to the opinion of the court as to the plaintiff's right to maintain this action, and as to the defendant's right to have said items of special damage deducted. The court, at the September term, 1872, WHEELER, J., presiding, rendered judgment, *pro forma*, for the plaintiff on the report, for \$978.78; to which the defendant excepted.

The plaintiff excepted to the allowance to the defendant of said item of \$100 which the referee found as the cost of finishing the 200 rods of road according to the contract, and of the item of \$41 for work by the defendant in completing the 478 rods of road. It would seem from the exceptions that the court disallowed the item of \$52 for loss on rent, and the item of \$23 for constructing the winter road.

*Chas. N. Davenport*, for the defendant.

I. The plaintiff cannot maintain the action of assumpsit; the contract under which he built the road in controversy, is a sealed instrument. Hence, if the defendant has failed to comply with its provisions, the plaintiff's remedy is in covenant, if the sealed instrument is still a subsisting contract.

a. There is a class of cases where it is held, that if a contract under seal is not performed within the time limited by the contract, but that time is extended by a parol agreement, a recovery may be had in assumpsit for performance within the extended time. *Monroe v. Perkins*, 9 Pick. 298; *Lottimore et als. v. Hosen*, 14 Johns. 330; *Porter et al. v. Stewart*, 2 Aik. 417; *Sherwin et al. v. R. & B. R. Co.* 24 Vt. 347; *Barker et als. v.*

*Troy & Rut. R. R. Co.* 27 Vt. 766; *Dana et al. v. Hancock*, 30 Vt. 616; *Briggs v. Vt. Cent. R. R. Co.* 31 Vt. 211.

b. It is also settled in Vermont, that when there is an entire contract, under which labor has been performed upon the realty, though not strictly in accordance with the contract, a right of recovery exists upon *quantum meruit* for the labor, deducting such damages as may have been sustained by the failure to perform the work according to contract. *Dyer v. Jones*, 8 Vt. 205; *Gilman et als. v. Hall*, 11 Vt. 510; *Morrow v. Huntoon*, 25 Vt. 9.

c. These cases rest upon a supposed necessity, in order to prevent a party who has received the benefit of meritorious services, from gaining an unconscionable advantage. The case at bar does not fall within either of these classes. The defendant's realty has not been benefited. When the plaintiff brought his suit, the defendant had no right of action against the town of Stratton, because the plaintiff's contract had not been performed. The plaintiff had not completed the road *in the manner* he contracted to do it, and the agents of Stratton had refused to accept the road.

d. Nor can it be claimed that there was any parol agreement that the time of performance should be extended. The referee finds that the "defendant did not extend the time for the plaintiff to build the road, though he suffered him to proceed with the work after the expiration of the time specified in the contract." This finding has not a single element of a new contract.

II. The most that can fairly be claimed in behalf of the plaintiff from the conduct of the defendant is, that he *acquiesced* in the plaintiff's going on to complete the contract, after the time limited had expired. The defendant never said a word, or did an act, indicating a purpose to abandon the contract, or release the plaintiff from its performance. The contract was still subsisting, and when the plaintiff completed the road to the acceptance of the selectmen of Stratton, he had a right of action upon his covenant. *Myrick v. Slason et al.* 19 Vt. 121.

a. I am aware that this position conflicts with the case of *Porter v. Stewart*, 2 Aik. 417, which was decided on the authority

of *Little v. Holland*, 3 T. R. 590. The technicality upon which those cases stand, precludes parties from extending, by simple contract, the time of performance for a day, while it permits the rights, duties, and liabilities of the parties to be essentially changed, when nothing of the kind was ever contemplated by them. It is time so nonsensical a doctrine should be exploded.

b. But suppose I am in error, and that the plaintiff's remedy after the time expired, is in assumpsit, and not covenant; then I submit that his action is prematurely brought. The defendant has never, by parol or specialty, made himself the plaintiff's debtor, save in the following manner: "\$100 on the completion and acceptance by the agents of the town of Stratton of each 100 rods of road, and all the balance on the completion and acceptance of the whole road by the agents of the town." The case shows that the defendant had paid the plaintiff on the contract \$841.50, when he had procured the acceptance under protest of 300 rods of road. At the time the suit was commenced, 478 rods of the road had not been completed according to contract. The selectmen had, on the 6th of May previous, indicated, by stakes and memoranda, what further work they required to be done. August 31, 1871, the selectmen again visited the road, and finding only a part of the work required, done, they again refused to accept said 478 rods. The plaintiff refused to do more, and told the defendant if the road "was not completed, he might finish it." The defendant did finish it, and procured its acceptance, pending this suit. What more "unconscionable advantage" could be taken by a party than to permit an action to be sustained upon this state of facts?

III. The provision of the contract, "and if either party fails to fulfill his part as agreed in the above agreement, then each party agrees to pay the other all the actual damages arising from such non-fulfillment," has never been waived or rescinded. The report finds that the defendant "remonstrated against his delays, and notified him he should claim damages in consequence thereof." If the plaintiff is allowed to recover, his damages should be recouped.

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Smith v. Smith.

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*J. G. Eddy and A. Stoddard*, for the plaintiff.

1. The action of covenant cannot be maintained upon an agreement under seal to perform a certain piece of work at a specified time, unless the work be performed within the time, and strictly in accordance with the terms of the agreement. *Sherwin et al. v. R. & B. R. R. Co.* 24 Vt. 347; *Barker et al. v. T. & R. R. R. Co.* 27 Vt. 766; *Myrick v. Slason*, 19 Vt. 121.

2. When work has been performed by one party under a special contract, but not according to the strict terms of the contract, if the other party has derived a benefit therefrom, the law implies a promise on the part of the person receiving the benefit of the labor, to pay what the work is reasonably worth; and this may be recovered in the action of general assumpsit. 2 Smith Lead. Cas. 20, 29; 2 Parsons Cont. 523; 2 Greenl. Ev. 84. And especially is this the case where, from the nature of the contract, it is impossible to put the parties *in statu quo*; as, where labor has been performed upon land, and cannot be transferred to the party performing the same; otherwise the party benefited would owe no equivalent, and the party performing the labor would be without any remedy. *Dyer v. Jones*, 8 Vt. 205; 2 Smith Lead. Cas. 29; *Gilman et als. v. Hall*, 11 Vt. 510; *Booth v. Tyson*, 15 Vt. 515. If the party for whom the work is performed, has adopted and accepted the work, his consent is presumed; and if he knew the work was going on, and did not dissent, or prohibit it, his assent is presumed. The rule is the same though the contract be under seal. *Barker et als. v. T. & R. R. R. Co.*, *supra*; *Sherwin et al. v. R. & B. R. R. Co.*, *supra*; *Myrick v. Slason et als. supra*, per REDFIELD, Judge. The defendant was a sub-contractor, and hence the road was worth to him what he received, or was entitled to receive, from the town of Stratton.

3. The defendant by using the road thereby accepted it; and having accepted it himself, cannot refuse to pay the plaintiff, even though the town of Stratton had not accepted it, nor paid defendant for it.

4. The court erred in allowing the one hundred dollars damages on the two hundred rods of road which was accepted by the town; first, because the damage was too remote; Sedgw. Dam.

77, 78; secondly, because defendant suffered no loss by reason of the road not having been made according to the contract. *Ib.* 217, 219, 252. So was the item of damages for cutting the winter road, too remote.

The opinion of the court was delivered by

PECK, J. The objection interposed by the defendant's counsel, that the action should have been covenant instead of assumpsit, cannot prevail. The contract was not performed on the part of the plaintiff within the time specified in the sealed instrument for such performance. Where the time for the performance of a contract on the part of the plaintiff, specified in a sealed instrument, is enlarged by the parties by parol agreement, the form of remedy is assumpsit, and not covenant or other action counting upon the contract as under seal. The referee finds that "the defendant did not extend the time for the plaintiff to build the road, though he suffered him to proceed with the work after the time specified in the contract; urged him to underlet a part of the road to others, which he might have done; remonstrated against his delays, and notified him he should claim damage in consequence thereof"; and, among other things, he finds that the defendant was present on the different occasions when the selectmen accepted certain portions of the road, and made no objection; some part of what they so accepted having been built after the time specified in the contract for completing the road. Although this does not bar the defendant from his right to insist on a deduction from the contract on account of damage by delay, yet it is a waiver of his right to the technical objection to the plaintiff's recovering at all, merely because he did not complete the whole road by the time specified in the written contract. Under such circumstances, assumpsit is the appropriate remedy.

It is further objected on the part of the defense that the action was prematurely commenced. The defendant's counsel bases this claim on the clause of the contract relating to the manner of payment; that is, the clause in the contract in which it is stated that one hundred dollars is to be paid on the completion and acceptance by the agents of the town of Stratton, of each 100



rods of road, and all the balance on the completion, and acceptance of the whole road by the agents of the town. It is claimed that the 478 rods of the 778 rods of the road, had not been completed at the commencement of the suit. One hundred rods was completed and accepted in the fall of 1869, and two hundred rods in November, 1870. The referee finds that the plaintiff built the whole road in the manner required by the contract, except the 200 rods accepted in November, 1870, as to which the stumps and roots were not sufficiently removed; that November 8, 1870, the plaintiff claimed that the remaining 478 rods of the road was completed according to the contract, and took off his teams, but the selectmen refused to accept this part of the road; and it does not appear that the plaintiff did any work on the road after the commencement of the suit.

The refusal of the town to accept this part of the road after it was completed according to the contract, till the defendant expended the \$41 after this suit was commenced, will not defeat the plaintiff's action. The contract between the parties is very specific as to the manner in which the road should be built; and the first 300 rods having been accepted, when the plaintiff had built the last 478 rods of the road according to the specifications of the contract, and especially after he had afforded a reasonable time for examination and acceptance of it, he was entitled to his pay. The plaintiff's right to compensation for building the road did not depend on the actual acceptance of the road by the town or its agents, the party in adverse interest. If so, by a wrongful refusal to accept it, the plaintiff might be defeated altogether of ever recovering any compensation. If his right to an action can be postponed by such wrongful refusal, it could thereby be defeated entirely. This objection to a recovery cannot prevail.

As to the amount the plaintiff should recover, the referee finds the balance due the plaintiff on the basis of the contract price for the construction of the road, eleven hundred twenty-eight dollars seventy-seven cents, subject to the opinion of the court as to the plaintiff's right to maintain this action, and as to the defendant's right to have certain items of special damage deducted. It is to be inferred from the exceptions from the amount of the

judgment rendered, that the county court allowed to the defendant the item of \$100 on account of the defects in the 200 rods of road accepted in November, 1870, and the \$41 for work the defendant performed upon the 478 rods, in order to induce the selectmen to accept it; and disallowed the \$52 loss on rent of house, and the \$23 cost of making the winter road in the winter of 1869-70. We think the \$52 item is left, upon the facts reported, too conjectural and remote to be regarded as damages so far naturally or necessarily resulting from the delay in the completion of the road, as to be allowed as damages. The \$100 which the referee finds it would have required to finish the two hundred rods of road accepted in the fall of 1870, the defendant could not have lost upon his contract with the town, as the town accepted that part of the road. But if the referee had found that this deficiency in this part of the road caused damage to the defendant to that amount, the defendant would be entitled to it. But when the referee simply finds on this point, that it is impossible for him to compute the damage this deficiency caused to the defendant, or how much less the road was worth for his purposes on this account, without saying, except by inference, that it was any damage, this court cannot assume any given sum as damage which he thereby sustained. The \$100, therefore, must be disallowed. The item of \$23, the cost of constructing the winter road by the defendant in consequence of the road not having been completed by the plaintiff by the time stipulated, is a proper item to be allowed as damages; for although the road the plaintiff contracted to make was a public highway, which the defendant had contracted with the town to construct, yet it was mainly to accommodate the defendant in reaching his tract of timber lands in connection with his business, which must have been known to the defendant, and hence this item of damage is of a character that must be regarded as in the contemplation of the parties at the time of the execution of their contract. As to the item of \$41, for labor done by the defendant on the 478 rods of road, it is conceded by the plaintiff's counsel in argument that it was properly allowed to the defendant by the county court, and therefore nothing need be said in relation to it.

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Stockwell v. Dummerston.

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The result is that the judgment of the county court is reversed, and judgment rendered for the plaintiff for the same amount, with the exception that the \$100 damages on the 200 rods of road, allowed by the county court, is not allowed to the defendant; and the \$23, for making the winter road, not allowed by the county court, is allowed to the defendant.

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DENSLow M. STOCKWELL v. THE TOWN OF DUMMERSTON.

*Towns. Highway Surveyor.*

A highway surveyor is bound *at all times* to keep the highways in his district in good and sufficient repair, irrespective of the amount of the highway-tax committed to him, and without the direction and authority of the selectmen; and for all necessary expenditures made by him for that purpose, beyond the amount of his tax-bill, and out of means not furnished by the town, the town is liable.

The act of 1864, fixing the wages of a man at fifteen cents an hour, and the price for teams, carriages, and tools, employed in repairing a highway, at such price as the town or selectmen shall establish, applies only to such persons as furnish work on the highway, or teams, carriages, and tools, in payment of a tax assessed against them.

GENERAL ASSUMPSIT. Trial by the court, September term, 1872, BARRETT, J., presiding.

In the years 1869 and 1870, the plaintiff was highway surveyor in district No. 12 in the defendant town. In the fall of 1869, the highways in said district were badly damaged by the freshet of that season, and the plaintiff expended in repairing said highways, immediately after the freshet, and by direction of the selectmen of the town, about ninety dollars, in addition to the ordinary highway-tax; with which expenditure, said highways "were so far put in repair as to render them usable by the public to travel over." There were only three tax-payers in said district in the year 1870, and the highway-tax of the district that year was about twelve dollars. In October and November of that year, the highways in said district were out of repair and perilous, and the plaintiff was told by different persons that unless he repaired them, they would make him trouble. Thereupon the plaintiff,

without informing any of the selectmen of the condition of the highways, or that the highway-tax was expended, employed laborers and repaired said highways, and therein paid out in good faith the several sums, and performed the work, amounting in all to the sum of \$99, which this suit was brought to recover for. The plaintiff did no more upon the roads than was necessary, nor than the town ought to have done, to put them in good and sufficient repair. No extraordinary occasion existed calling for said expenditure of money and labor, but the expenditure was made by the plaintiff, as highway surveyor, in the ordinary course of repairing the highways, without the knowledge or direction of any of the selectmen; and there was no evidence tending to prove that any of the selectmen ever promised to pay the plaintiff therefor. Upon the foregoing facts the court rendered judgment for the plaintiff for the aforesaid sum, and interest thereon. To the ruling of the court holding the town liable, but not as to interest, the defendant excepted.

*George Howe*, for the defendant.

The powers and duties of a highway surveyor are very clearly defined by the statute, and the various modes of raising the money to enable him to perform these duties, are also particularly enumerated. His territorial limits are determined by the selectmen of the town, and it is their duty annually, and previous to the 25th day of May, to assess a tax of twenty-five cents on the grand list, to be paid in labor and laid out in repairing highways and bridges. Gen Stat. ch. 25, §2. For the purpose of keeping the highways in repair, the town may vote a tax in addition to this assessed by the selectmen. Ch. 25, §13. When the surveyor has received his tax-bill and warrant from the selectmen, then his duties begin. He is now to superintend the expenditure of this highway-tax—to take charge of and keep in repair the highways in his district at all times. Ch. 25, §5. The repairs mentioned in the sections referred to, are evidently those ordinary repairs which are annually necessary, and for which the tax of twenty-five per cent. is regularly assessed by the selectmen.

Section eighteen provides for extraordinary occasions, prescribes the particular duties of the surveyor on such occasions, confers upon him extraordinary powers, equal to the emergency, and when the highway is suddenly destroyed or impaired, so as to require immediate repairs, or is obstructed in any manner, then it is that the highway surveyor *may hire other laborers than taxpayers, or employ other means*, to open or repair the highways or bridges thus *suddenly* destroyed or obstructed. It is only on these extraordinary occasions that the highway surveyor is invested with the extraordinary powers mentioned in section 18. When the plaintiff in this case had expended the amount of money provided for in his tax-bill, if the highways were still out of repair, it was his duty to have informed the selectmen of the facts, and under sec. 18, ch. 25, the town, or the selectmen, could have furnished him with the means necessary to complete the repairs. Section 18 of the statute having expressly provided that on any extraordinary occasion the surveyor may exercise these extraordinary powers, prohibits by necessary implication their exercise on any other occasion. If the taxes assessed by the selectmen were insufficient to complete the ordinary repairs of the highways in his district, it was not competent for the plaintiff to supply the deficit in the manner he did. Section 18 of the statute confers that authority upon the town, or the selectmen. The plaintiff in this case not only acted without authority, but directly contrary to the statute, and, his conduct not having been ratified by the selectmen, nor the town, he is not entitled to recover.

*Clarke & Haskins* and *C. N. Davenport*, for the plaintiff.

1. It is made the duty of towns to keep all highways and bridges within their bounds in good and sufficient repair, at the expense of such towns, at all seasons of the year. Gen. Stat. ch. 25, §1.

2. It is made the duty of the highway surveyor, not only to superintend the expenditure of the tax committed to him by the selectmen, but "*to take charge of and keep in repair at all times the highways in his district*," and he is further made directly responsible to the town for any damages which the town may sus-

tain through his fault or neglect in the discharge of his duty. Gen. Stat. ch. 25, §§5, 6, 7; *Newbury v. Tenney*, 2 Aik. 295; *Dassance v. Gates*, 13 Vt. 275. Upon a careful examination of the statutes relating to the repair of highways and bridges, it is perfectly apparent that it was manifestly the intention of the legislature in imposing upon the highway surveyors the duty of keeping in good and sufficient repair *at all times*, the highways and bridges in their respective districts, and in making them directly responsible to the town for any damages the town may sustain through their neglect of that duty, to clothe them with powers to act in the premises, commensurate with the duties and responsibilities thus imposed upon them. Hence we insist that the several highway surveyors are, during the official term and by force of the statute, the authorized agents of the town, for the purpose of keeping in repair at all times, and in all seasons of the year, the highways in their respective districts, without reference to whether the amount of tax specified in the rate-bill committed to them by the selectmen, has been expended or not.

3. The theory urged by the defendant's counsel, that the selectmen have any *exclusive* power or control over the repair of highways, is a mistaken one. They have a "general supervision of the concerns of the town, and shall cause all duties required by law of towns, and *not committed* to the care of any particular officer, to be duly performed and executed." Gen. Stat. ch. 15, §45; *Middlebury et als. v. Rood*, 7 Vt. 125; *Hollister v. Pawlet*, 43 Vt. 425. The duty of keeping the highways in district No. 12, in Dummerston, in good and sufficient repair during the year 1870, was *committed* to the plaintiff. The power of the selectmen to supervise him in the discharge of the duty thus committed, was no more extensive than their power to supervise the listers, constables, grand jurors, or any other of their town officers in the discharge of their especial duties as pointed out by statute. The statute makes it the duty of the selectmen to divide their towns into convenient highway districts, to nominate surveyors, to make out and deliver to the surveyors proper rate-bills for highway taxes, and to furnish them with blank books in which to keep their accounts. But the statute nowhere empowers the

selectmen to direct the surveyor when, where, or how he shall discharge his duty. Such directions, and all such instruction as the surveyor may require in the discharge of his duties, are prescribed by law, and may be found within the statute. The highway surveyor, therefore, is as potential within his sphere, as the selectmen are within theirs.

4. It was urged by the defendant's counsel in the court below, that it was only competent for a surveyor, "on an extraordinary occasion," to employ other means than his rate-bill to open and repair highways in his district, and sections 18 to 21 inclusive, ch. 25, of the Gen. Stat; were cited as authority. We do not so construe those sections. We contend that their purpose is not to limit or abridge the powers of the surveyor in *ordinary* cases, but to so enlarge them by giving him authority in *emergencies* to draft into service any inhabitant of the district, whether owing a tax or not, that he may effectually discharge the duty which the town, through him, owes to the public, of keeping its highways in "good and sufficient repair," and at the same time to relieve himself from the *additional* consequences of his neglect in such case, as is provided in said section 20. *Dassance v. Gates*, 13 Vt. 275.

5. We have thus far discussed the principles involved in this case, without reference to judicial decisions. We are not aware that there is any decided case in Vermont that stands in the way of the plaintiff's right of recovery. In a case not entirely dissimilar to the one at bar, decided several years ago, the learned judge in delivering the opinion of the court, said: "It may, perhaps, well be questioned, whether the surveyor, in consequence of the duty thus imposed upon him, and his responsibility to the town for all damages that may be sustained by reason of his neglect, has not the power to repair the road at the expense of the town, when the tax committed to him is insufficient to make the ordinary repairs." *Gassett v. Andover*, 21 Vt. 342, 350. The doctrine as thus laid down has since been fully recognized in a case more in point, and is, we believe, the established rule of law in this state at the present time. *Lamphire v. Windsor*, 27 Vt. 544.

The opinion of the court was delivered by

PECK, J. The statute requires that "all highways and bridges within the bounds of any town, shall be kept in good and sufficient repair, at the expense of such town, at all seasons of the year." For this purpose, in addition to the twenty-five per cent. which the statute requires the selectmen to assess upon the grand list of the town, provision is made by statute for the raising of money by the town by vote at their annual March meeting, or at any special meeting warned for that purpose, to the extent that shall be necessary for the performance of this duty by the town. To enforce this duty, and to indemnify the public against the consequences of a neglect of its performance, it is provided that if any special damage shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, he shall have an action to recover the same against the town. Such is the duty and liability of the town to the public. As to the agencies or instrumentalities through which this duty is to be performed, in addition to the provision for the election of highway surveyors by the town, and for the division of the town by the selectmen into highway districts convenient for repairing highways, and for the making out and delivery of a tax-bill to each surveyor, containing the amount of tax set or assigned to his district, it is provided that "it shall be the duty of each surveyor of highways to superintend the expenditure of the tax, and to take charge of, and keep in repair at all times, the highways in his district; and he shall be responsible to the town for any damages which may be sustained by the town through his fault or neglect in the discharge of his duty." The claim on the part of the defense is, that this provision as to the duty and liability of the highway surveyor, does not require him to do more than faithfully to expend the amount of taxes in his tax-bill, in the repair of the highways, or authorize him to do more at the expense of the town, at least without the direction of the selectmen. But this language of the statute, imposing the duty upon the highway surveyor "to superintend



the expenditure of the tax, *and to take charge of, and keep in repair at all times, the highways in his district,*" is too explicit, comprehensive, and unqualified, to limit his duty by the amount of the tax-bill put into his hands, or to make the performance of it dependent on the will of the selectmen. Whatever duty rested upon the selectmen in the matter, if any, was not in diminution of the duty of the plaintiff, but in aid of its performance. The plaintiff, in the expenditure of the money and performance of the labor for which he claims to recover, did no more than his official duty required, and had he done less, he would have been guilty of official neglect. As highways are to be "kept in good and sufficient repair *at the expense of such town* at all seasons of the year," and as the plaintiff, as the proper officer of the town for that purpose, has necessarily, without means furnished him by the town, performed so much of that duty as the statute required of him, he has done it on the credit of the town, and is entitled to recover for it in this action. It is difficult to perceive how the statute can bear any other construction. It is insisted on the part of the defense, that the power of the highway surveyor to expend more than the tax-bill put into his hands, is limited to the extraordinary occasions of sudden injury to a bridge or highway, mentioned in ch. 25, § 18. But it is obvious that section was not intended as a limitation or restriction of the duty and power in question to such extraordinary occasion when a bridge or highway should be suddenly destroyed or impaired, but only to speed the reparation of the bridge or highway in such case; as is evident from the fact that it imposes a penalty in such case of sudden injury, on the highway surveyor for neglect to proceed within twelve hours after application to him; and on the inhabitants of the district in the tax-bill, for neglect to turn out and assist on six hours notice from the highway surveyor, whether any tax is due from them or not. The act of 1797 (Slade's Comp. Stat. 427, compiled in 1824) contains substantially the same provisions as to the duties, powers, and liabilities of highway surveyors, as the present statute, except the words, "*and to take charge of, and keep in repair at all times, the highways in his district.*" This provision first appears in any compilation or col-

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lation of the statutes, in the Rev. Stat. of 1889. I have not examined the pamphlet laws to see whether it was enacted in the meantime; but whenever it was enacted, it was obviously inserted as a clear and explicit imposition of duty upon highway surveyors to keep the highways in their respective districts in repair, irrespective of the amount of taxes put into their hands for that purpose.

It is insisted that if the town is liable, the plaintiff is limited to the rate of compensation fixed by the statute. But the provision of the act of 1864, fixing the wages of a man at fifteen cents per hour, and the price for teams, carriages, and tools employed in making repairs, at such price as the town at their annual meeting, or the selectmen, shall establish, applies only to each person who shall furnish work on the highway, or teams, carriages, or tools, "in payment of his highway tax assessed by the selectmen." It is not stated that any such question was raised in the county court, nor that the plaintiff's charges exceed the statute rate. Nor can it be with reasonable certainty inferred from the items of the account as charged. But assuming this sufficiently appears, the statute does not apply to the claim.

Judgment affirmed.

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THE TOWN OF WARDSBORO v. THE TOWNS OF WHITINGHAM AND  
DOVER.

[IN CHANCERY.]

*Jurisdiction of Chancery to impeach proceedings at Law for  
Irregularity.*

It is a general principle of equity jurisprudence, that a court of chancery will not entertain a bill to impeach a judgment at law, for mere irregularity in the proceedings, but leave such questions arising in legal proceedings, to the exclusive jurisdiction of courts of law.

Neither will a court of chancery entertain a bill to try the truth of an officer's return by parol testimony; nor to grant relief upon falsifying the record of the doings of a sworn officer in a proceeding at law.

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APPEAL from the court of chancery. The bill alleged that on the 30th of September, 1862, a court of examination was held by William H. Jones and Laban Jones, justices of the peace, at Dover, in said county, upon a complaint of Elliott Harris, overseer of the poor of said town of Dover, against one Joseph Converse, charging that said Converse had come to reside in said Dover, and had not gained a legal settlement therein, and that he was likely to become chargeable to said Dover as a pauper; that said justices, after hearing upon said complaint, adjudged that said Converse had come to reside in said Dover, that he had not a legal settlement therein, and that he was likely to become chargeable thereto, and that his legal settlement was in the town of Wardsboro, and thereupon made an order of removal, directing the said Converse to remove, with his family and effects, to said Wardsboro, on or before the 15th day of October then next, and if he should not comply with said order, that he be removed, with his family and effects, to said Wardsboro; that said justices then and there made and certified a copy of the record of said order of removal, and appended thereto a notice, directed to any sheriff or constable in the state, commanding him to notify the overseer of the poor of said town of Wardsboro that said Converse was ordered to remove to said Wardsboro, as above set forth in said order of removal; that said certified copy of said order, with the notice appended thereto, was placed in the hands of D. A. Yeaw, a deputy sheriff, to serve and return, and that said Yeaw did, by the procurement of said Dover, make and endorse a return thereon that he served the same on Josiah G. Higgins, overseer of the poor of the town of Wardsboro, by leaving a true and attested copy thereof at his house, in the hands of Wales Willard, he being a person of sufficient discretion with whom to leave the same; that no copy of said order of removal or notice was ever delivered to said Higgins, who was then the overseer of the poor of said Wardsboro, or left at his dwelling-house; that the said Willard was not authorized by the said Higgins, overseer as aforesaid, nor by said town of Wardsboro, to receive said copy for him, or for said town; that if such copy was left by said Yeaw with said Wales

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Willard, it was never delivered to said Higgins, nor to said town, and neither said Higgins nor said town of Wardsboro was ever notified of said order of removal in any manner, and had no knowledge of the same, and that they were wholly deprived of their day in court; that said Converse did not, at the time of making said order of removal, have his legal settlement in Wardsboro, and has not since gained a legal settlement therein in any other manner than by said judgment and order of removal, and that he was never removed pursuant to said order; that on or about the 18th day of February, 1871, said Converse, with his wife and effects, was removed from Whitingham to said Wardsboro, by order of a court of examination, held at Whitingham, in said county, on the 7th day of February, 1871; that said town of Wardsboro appealed from said order of removal to the then next term of the Windham county court, and that said cause is now pending; that the orator has reason to fear, and does fear, that it may be estopped by the order and judgment first aforesaid, from showing that said Converse has not a legal settlement in said Wardsboro, and that said Whitingham insists that said judgment and order of removal are binding upon said Wardsboro. Prayer, that said judgment be vacated and held for naught, and for further relief.

The answer of the town of Whitingham admitted all the allegations of the bill as to the order of removal made by the town of Dover, and admitted the service of the order and notice according to the return of said Yeaw thereon indorsed, which was as follows:

"STATE OF VERMONT, ) At Wardsboro, on the 17th day of October, A. D. 1862, I served this order of removal and citation on Josiah Higgins, the overseer of the poor of the town of Wardsboro, by leaving a true and attested copy of this order of removal and citation at his house, in the hands of Wales Willard, he being a person of suitable discretion with whom to leave the same.

Attest, D. W. YEAW, Deputy Sheriff."

Denied that no copy of said order and notice was ever delivered to the said Higgins, or left at his dwelling-house and usual place of abode for him, and averred that said Yeaw did in fact

leave a true and attested copy of said order and notice at the house of the usual abode of the said Higgins, in the hands of the said Willard, a person of sufficient discretion then resident therein. Alleged that the town had no knowledge as to whether said Willard delivered said copy to the said Higgins, or not, and insisted that, whether he did or not, it was immaterial to said town, because, if said order and notice were properly served upon said Higgins within thirty days from the time of making said order, in the manner that writs of summons were by law required to be served, and no appeal was taken from said order by the orator, the settlement of said Converse was thereby fixed and established in said town of Wardsboro. Denied that the orator had been deprived of its day in court, or that it had been deprived of any right to appeal from said order, and alleged that said Higgins had no intention of taking an appeal therefrom, and that the orator from the time of the making of said order, thenceforth, for many years, and until the time of the making of said order by the town of Whitingham, as stated in said bill, continued to act upon the supposition that the legal settlement of the said Converse was in the town of Wardsboro, and that in at least one instance the orator had voluntarily, upon demand made, reimbursed the town of Whitingham for expenses incurred in the support of one of the minor children of the said Converse, who became chargeable to said town as a transient pauper. Admitted the order of removal made by said Whitingham, as stated in the bill; that the orator appealed from the same, and that the case was still pending; and that said town did insist that said first named order of removal was valid and binding upon the orator; and alleged that said order, as well as the aforesaid action of the orator in regard to the support of the minor child of the said Converse, was relied upon by the justices making said order of removal from the town of Whitingham, as evidence conclusively fixing the settlement of the said Converse in the town of Wardsboro. Averred that the subject-matter of the judgment of the said justices making said first named order of removal, was within the jurisdiction of said justices, and that their judgment was only subject to revision on appeal to the county court within and for the county

of Windham, and could not in any way or manner be examined, annulled, or reversed, by the court of chancery. Insisted that the orator's bill showed no cause for discovery or relief, and no sufficient reason, cause, or omission, for the intervention of the court of chancery; prayed for the same advantage as if a demurrer had been filed to the bill; and insisted that said first named order of removal, and the proceedings and adjudication of the justices making the same, conclusively fixed and determined the last legal settlement of the said Converse, and of his wife and minor children, and that the same were not subject to revision by the court of chancery; and that, if by reason of any informality in the said proceedings they were not conclusive upon the orator, and did not fix the last legal settlement of the said Converse, his wife and minor children, the orator had a full and complete remedy at law; and that in no event had the orator a right to resort to a court of equity.

The answer of the town of Dover admitted all the allegations of the bill as to the order of removal made by said town, and also admitted the service of said order and notice by the said Yeaw, and set out the return thereon, and denied that said return was made by the procurement of said town of Dover, or of any of its officers and agents, but insisted that the only part said town had in making said return, or in procuring it to be made, was the mere act of some citizen of said town, who put said order and notice into the hands of the said Yeaw, a legal deputy sheriff, to serve and return according to law. Alleged that said town was ignorant of all and every the other matters alleged in said bill, and insisted that it was a stranger to the controversy between the orator and said Whitingham, and improperly made a party to said bill, and submitted that all and every the matters in said bill mentioned and complained of, were matters cognizable at law, and in respect to which the orator was not entitled to relief in a court of equity; and prayed the same relief as if a demurrer to the bill had been filed. The answers were traversed, and testimony taken. The court, at the September term, 1872, dismissed the bill, *pro forma*; from which decree the orator appealed.

*J. G. Eddy* and *A. Stoddard*, for the orator.

By the statute in force in 1862, the time this order was made, when the pauper was not removed, a notice of the order of removal might be served upon the town to which the pauper was ordered to be removed, either by leaving a copy of the order, certified by the justices making the same, with the overseer of the poor of such town, or the justices might make and certify copies of such order, and append thereto a notice of the same, which was served in the same manner that writs of summons are required to be served. Comp. Stat. ch. 18, §§ 11, 12, 13, 14, 15. If notice had been served by the justices, or some private citizen, by simply leaving a copy of the order of removal with the overseer, the record would not show any service; still, the service would be legal. The same would be true had the pauper been actually removed by the officer, and no return of his doings been made. It is true that in this case the records show an attempt by an officer to serve the order in the same manner that writs of summons are required to be served; still, it might have been served in the mode pointed out by the statute, and hence the records show a valid judgment against Wardsboro.

After a lapse of time—twenty years—the law presumes that all persons concerned had due notice of the proceedings. 1 Greenl. Ev. 25; *Brown v. Wood*, 17 Mass. 68.

The case shows that no notice was ever given to Wardsboro of the order of removal, except in the manner mentioned in the officer's return who attempted to serve it, which was manifestly bad. *Stone v. Seaver*, 5 Vt. 549; *Barnet v. Concord*, 4 Vt. 564; *Barre v. Morristown*, 4 Vt. 574. Although perhaps not void, but only avoidable. *Newton v. Adams et al.* 4 Vt. 437.

The officer acted at the request and solicitation of the town of Dover, and hence what he did is supposed to have been done by the town through him.

Chancery will relieve against a judgment obtained by fraud, imposition, or misconduct of the opposite party, or when obtained by accident or mistake, and the party has been deprived of his day in court. 1 Mad. Ch. Pract. 298; 3 Dan. Ch. Pract. 1843; 2 Story Eq. Jur. 217, §§ 85, 87; 1 Johns. Ch. 402; 1 Bouv.

Law Dict. 220 ; *County of Essex v. Berry*, 2 Vt. 161 ; *Emerson v. Udall*, 13 Vt. 477 ; 2 Swift Dig. 42.

An action against the officer for a false or illegal and irregular return and service, is wholly inadequate.

*Chas. N. Davenport* and *H. N. Hix*, for Whitingham.

The prayer of the bill should not be granted. The statute has conferred jurisdiction upon two justices to determine originally the settlements of paupers. Their judgments have the same authority, and bind the parties to the same extent, as those of superior tribunals. In addition to its force as a judgment *inter partes*, so far as other towns are concerned, it has the effect of a proceeding *in rem*. These judgments are only subject to revision upon appeal. It is not the province of a court of equity to revise or reform the judgments of courts of law. It has jurisdiction to prevent a party from using a judgment which he has fraudulently obtained in furtherance of a legal wrong. In the case at bar, it is not claimed that the defendant has been guilty of any fraud. *Stowe v. Brookfield*, 26 Vt. 524 ; *Farr v. Ladd*, 37 Vt. 156 ; *Eastman et al. v. Waterman*, 26 Vt. 494 ; *Shedd et al. v. The Bank of Brattleboro*, 82 Vt. 709 ; *Emerson v. Udall*, 13 Vt. 477 ; *Fletcher v. Warren*, 18 Vt. 45 ; *Warner v. Conant*, 24 Vt. 351.

It is well settled that the omission to take an appeal and prosecute to effect, by a town to which a pauper is ordered to remove, conclusively fixes the settlement of the pauper in such town. *Manchester v. Dorset*, 3 Vt. 370 ; *Barre v. Morristown*, 4 Vt. 574 ; *Rupert v. Sandgate*, 10 Vt. 278 ; *Charleston v. Lunenburg*, 23 Vt. 525 ; *Stowe v. Brookfield*, *supra* ; *Chester v. Wheelock*, 23 Vt. 554 ; *Hale v. Turner*, 29 Vt. 350 ; *Poultney v. Sandgate*, 35 Vt. 146.

This conclusive effect of a judgment unappealed from, cannot of course exist, unless the town to be affected thereby had notice, so that an appeal could have been taken. *Fairfield v. St. Albans*, Brayt. 176 ; *Reading v. Rockingham*, 2 Aik. 272 ; *Barnet v. Concord*, 4 Vt. 564, 570 ; *Marshfield v. Calais*, 16 Vt. 598 ; *East Haven v. Derby*, 38 Vt. 258.



But whether notice of the order was given or not, must be determined by the return of sheriff Yeaw. His return is conclusive as to the parties to the process, and all claiming under them. If the return is false, the orator's remedy is against the officer. *Hawks v. Baldwin*, Brayt. 85; *Hathaway v. Phelps*, 2 Aik. 84; *Stevens v. Brown*, 3 Vt. 420; *Swift v. Cobb et al.* 10 Vt. 282; *Barrett v. Copeland*, 18 Vt. 67; *White River Bank v. Downer et als.* 29 Vt. 332, 338; *Charleston v. Lunenburg*, 23 Vt. 525; *Poullney v. Sandgate*, *supra*; *East Haven v. Derby*, *supra*.

The case at bar can be correctly summed up in a single proposition. If sheriff Yeaw's return is insufficient to show notice to Wardsboro, then the remedy at law is perfect. If it is sufficient, then the settlement of Converse is conclusively established. In either view, there is no occasion for a court of equity to interfere, and the bill should be dismissed. *Emerson v. Udall*, 13 Vt. 477; *Shedd et al. v. The Bank of Brattleboro*, *supra*.

In our view, the evidence filed by the parties, other than the copy of the record, is not admissible. We do not understand that any part of the record is subject to contradiction or explanation by parol. If, however, this is an open question, we insist that the evidence as a whole, including the conduct of Knights with reference to the son of Joseph Converse, shows notice in fact of this order.

The opinion of the court was delivered by

PECK, J. In this case we find no fraud on the part of any of the actors in the matter of procuring and making the order of removal from Dover to Wardsboro, and the service of the order and notice upon Wardsboro in 1862, nor any intentional wrong in the proceedings. Nor is fraud alleged in the bill. Therefore, there can be no pretense to a right to relief upon the ground of fraud, if relief could be granted in equity in a case of this kind upon the ground of fraud alleged and proved. The orator claims that that order of removal be vacated and held for naught, for the reason that upon the face of the record the officer's return of service of the order of removal upon the overseer of Wardsboro, is insufficient to render the proceedings valid;

and also that if the return is sufficient on the face of it, it is untrue in fact.

As to the first of these grounds, if the record does not show such notice to Wardsboro as is necessary to give validity to the order of removal against the orator, then the orator's remedy is plain and perfect at law, and aid from this court is not necessary or proper. On the other hand, if the record shows such legal notice as renders the order binding on the orator, it is equally binding as it stands, in this court as in a court of law. Upon the other of these grounds of relief, this court is asked to try the truth of the officer's return upon parol testimony, and grant relief upon falsifying the record of the doings of a sworn officer in a proceeding at law. Whether the case is viewed as a defective record, or as an alleged false return, it is, in either aspect, but an alleged irregularity in that proceeding. It is a general principle of equity jurisprudence, that a court of chancery will not entertain a bill to impeach a judgment at law for mere irregularity in the proceedings, but leave such questions arising in legal proceedings to the exclusive jurisdiction of courts of law. The question in this case is at least very analogous to questions to which this principle has been applied. A practice allowing judgments at law and legal proceedings to be overturned in a court of equity by falsifying the returns of sworn officers by testimony of witnesses, years after the transaction, would be of dangerous tendency, and do more mischief and injustice than it would prevent.

Decree of the court of chancery dismissing the bill, affirmed, and the cause remanded for decree accordingly.

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Windham v. Chester.

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## THE TOWN OF WINDHAM v. THE TOWN OF CHESTER.

*Order of Removal. Motion to Quash. Officer's Return.*

The complaint for an order of removal was against C., late of G., and W. and her children, late of the defendant town. The order appealed from was only for the removal of W., with her family and effects, and C. was not named therein. *Held*, that the joinder of C. in the complaint, was no cause for quashing said order.

An order of removal of a pauper, "her family and effects," is sufficient. The order need not set forth the names of the different persons constituting the pauper's family, any more than it need particularize the different articles of the pauper's effects.

An officer's return in pauper proceedings, is, at least, *prima facie* evidence, as between the parties, of the truth of the service therein stated.

APPEAL from an order of removal of Louisa Walker, her family and effects, from the town of Windham to the town of Chester.

The complaint was dated January 25th, 1872, and alleged that "Alonzo B. Cook, late of Grafton, a stranger, has come to reside in said town of Windham, and has not gained a legal settlement therein; and, also, one Louisa Walker and children, strangers, late of Chester, in the county of Windsor, have come to reside in said town of Windham, and have not gained a legal settlement therein; and that the said Cook, Walker and her children, are likely to become chargeable," &c. Prayer for process against the said "Alonzo B. Cook and Louisa Walker," in the usual form. The warrant attached to said complaint was dated January 29, 1872, and commanded the officer to bring the bodies of "Alonzo B. Cook, and Louisa Walker and her children," before the justices, on the 2d day of February, 1872. The officer's return thereon was dated February 2d, 1872, and stated that he had "the within named Alonzo B. Cook and Louisa Walker in court," &c.

The warrant of removal, dated the same day, did not name the said Cook, but recited the order made on the same day for the removal of the said Louisa, "her family and effects," on or before the 8th day of said February. To said last named order, was appended a notice to the overseer of the poor of Chester, made in the form prescribed by No. 18 of the acts of 1864, which

named only the said Louisa. The officer's return upon said warrant and notice, was as follows :

"At Chester, in said county, this 8th day of February, A. D. 1872, then by virtue of the order of removal, a certified copy of which is attached to the within precept to me directed, I served the same by leaving a true and attested copy of the same with Addison Adams, overseer of the poor of said town of Chester, and, also, then and there left with said overseer a like true and attested copy of this precept, with this my return hereon thereon indorsed, attested by me."

Nothing but the files above mentioned was shown to the court on the trial.

The defendant moved to quash the order of removal ; first, because the said Louisa was not removed within thirty days after the making of such order, nor a certified copy of said order, with a notice thereto appended, served on the overseer of the poor of said Chester within said thirty days ; secondly, because neither the number nor the names of the said Louisa's children, were in said complaint or warrant of removal ; thirdly, because the said Cook was joined with the said Louisa in said complaint.

The court, at the April term, 1872, BARRETT, J., presiding, rendered judgment that said order of removal be quashed ; to which the plaintiff excepted.

*Waterman & Reed*, for the plaintiff.

The officer's return, which is made a part of the exceptions, shows that a true and attested copy of a certified copy of the order of removal, and a true and attested copy of the notice, were left with the overseer of the poor of the defendant town within thirty days after the making of said order. This return is conclusive evidence of the fact as between the parties, and is sufficient. *Laws of 1864*, p. 38 ; *Barnet v. Woodbury*, 40 Vt. 266 ; *White River Bank v. Downer & Trs.* 29 Vt. 332 ; *Witherell v. Goss & Deland*, 26 Vt. 748 ; *Barrett v. Copeland*, 18 Vt. 67 ; *Staniford v. Barry*, 1 Aik. 321 ; *Hawks v. Baldwin & Co.* Brayt. 85.

The defendant having set forth in the notice the grounds for quashing the order, must stand on them. If they are insufficient,

the motion should be overruled. "The statutory ground for the motion should be distinctly brought to the attention of the court, \* \* \* stating fully and explicitly the statutory cause." *Barnet v. Emery*, 43 Vt. 178. The court will not go outside the grounds stated in the motion to find defects in the service. The motion does not allege sufficient grounds for quashing the appeal. It was evidently drawn in view of §11 of ch. 20 of the Gen. Stat., which, before it was repealed, required service to be made by leaving a copy of the order and notice with the overseer, which, the motion alleges, was not done in this case. Gen. Stat. ch. 20, §11; Acts of 1864, p. 38; *Barnet v. Woodbury*, 40 Vt. 266.

It is not necessary that the complaint or warrant of removal should contain either the number or names of said Walker's children. *Landgrove v. Pawlet*, 20 Vt. 309; *Burlington v. Essex*, 19 Vt. 91; *Bristol v. Braintree*, 10 Vt. 203.

It is no objection to the order of removal that Alonzo B. Cook was joined with said Walker in the complaint. Cook's name does not appear in either the order or warrant of removal. The complaint is not a material part of the pleadings. *Wilmington v. Jamaica*, 42 Vt. 694.

*L. Adams and Hugh Henry*, for the defendant.

The provisions of the statute are mandatory as well as directory, and an exact compliance with all the terms of the statute was necessary, in order to make the proceedings in this case regular and effectual; and the fact that the material requirements were disregarded and omitted in this case, make the proceedings on the part of the town of Windham, irregular, and the court below ruled rightly in sustaining the motion to quash.

1st. Because the statutes, and the act of November 15th, 1864, require that the pauper be actually removed to the town adjudged liable, within thirty days after the making of such order of removal, which, in this case, was not done; or, that a copy of the order of removal, and notice, shall be left with the overseer of the poor of the town to which the pauper is to be removed, which was not done in this case; and the omission so to do, is fatal, and a non-compliance with the provisions of the statute. Gen. Stat. ch. 20,

§ 11; *Georgia v. St. Albans*, 3 Vt. 42; *Dorset v. Rutland*, 16 Vt. 419; *Sharon v. Strafford*, 37 Vt. 74; No. 18 of acts of 1864; *Barre v. Morristown*, 4 Vt. 575; *Marshfield v. Calais*, 16 Vt. 598; *Barnet v. Woodbury*, 40 Vt. 266.

2d. Neither the names or the number of the children of the pauper sought to be removed, are given in the complaint or warrant of removal, which is fatal, as we claim the law is that both the names and number must be given. *Hartland v. Williamstown*, 1 Aik. 241.

3d. The complaint joins one Alonzo B. Cook, who is complained of as having a settlement in the town of Grafton, which is in the county of Windham, with Louisa Walker, who is complained of as being a pauper, chargeable to the town of Chester, which is in the county of Windsor, which is a misjoinder and fatal, and makes the proceedings on the part of the town of Windham null and void, and entitles the appellant town to recover their costs.

The opinion of the court was delivered by

ROSS, J. I. The defendant's third ground for quashing the order of removal of the pauper, Louisa Walker, as stated in its motion, is, that one Alonzo B. Cook is joined with said Walker in the complaint. The order of removal of Louisa Walker and family, is that which is appealed from; Cook is not joined in the order which is the subject of appeal. The complaint sets up Cook as a resident of Grafton, and not as a resident of Chester. From the papers in the case, it does not appear whether the justices made any order in regard to him. As he is not named in the order appealed from, we are unable to see how the defendant is affected injuriously, or otherwise, by the fact that he is named in the same complaint by the overseer of the plaintiff to the justices, or how the fact that he is joined in the complaint with the pauper ordered to be removed to the defendant, can be a misjoinder that the defendant can take advantage of in a motion to quash. If Cook had been included in this order of removal, it doubtless would have been a misjoinder, as the order of removal is the subject-matter brought up from the justices for adjudication in the county court. The complaint, by § 4, ch. 20 of the

Gen. Stat., is rendered necessary, to enable the justices to issue the warrant to bring the paupers named in the complaint before them, that they may make the necessary inquiries, to enable them to make an order of removal if the facts found by them warrant it. No section of the statute requires the complaint, or a copy of it, to be sent by the justices to the county court, as a necessary paper in the proceedings of that court. We think this alleged ground for quashing the order is not tenable.

II. The defendant's second ground for quashing the order is, that neither the number, nor the names of said Walker's children, are given in the complaint, or warrant of removal as required by the decision, 1 Aiken, 241, *Hartland v. Williamstown*. This ground for quashing the order is disposed of by the decision of this court in *Landgrove v. Pawlet*, 20 Vt. 309, in which the court review the case in 1 Aiken, and subsequent cases to that time, and hold that an order for the removal of a pauper, with his family and effects, is sufficient, and that the order need not set forth the names of the different persons constituting the pauper's family, any more than it need particularize the different articles constituting the effects of the pauper.

III. The defendant's first ground for quashing the order is, that the pauper was not removed to the defendant town within thirty days after the making of the order; nor was any certified copy of the order of removal and the notice, left with the overseer of the poor of the defendant within thirty days after the making of the order, as required by the statute. The defendant admits that a copy of the warrant of removal was left within thirty days after the making of the order. The judge who certifies the exception refers to the files, and says they constituted all that was shown to the court on the trial. The files referred to as shown to this court, consist of the complaint of the overseer of the poor of the plaintiff to the justices; the justices' warrant on the complaint to the officer to bring the paupers before them; the officer's return on said warrant; the warrant for the removal of the pauper, Louisa Walker, with her family and effects, from the plaintiff town to the defendant town, issued by the justices; the notice issued by the justices to the defendant town; and the officer's

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return, said to be made on the warrant and notice. The officer's return states that, "by virtue of the order of removal, a certified copy of which is attached to the within precept to me directed, I served the same by leaving a true and attested copy of the same with Addison Adams, overseer of the poor of said town of Chester, and, also, then and there left with said overseer a like true and attested copy of this precept, with this my return," &c. If this return of the officer is to be taken as true, the officer served a certified copy of the order of removal and the notice on the overseer of the defendant town. If the officer did this, the defendant town has received just such service of the papers in the case as § 1, No. 18, of the acts of 1864, which this court held in *Barnet v. Woodbury*, 40 Vt. 266, to be a substitute for § 11, ch. 20, of the Gen. Statutes, requires. The defendant, whose duty it was to bring to the county court the proper papers for the appeal, has shown to that court no copy of such an order of removal as the officer's return shows was served on the defendant. The county court have not found that no such order of removal exists. We cannot, from the fact that no copies have been produced by the defendant in the county court, assume that no order of removal has been made by the justices, nor that the justices did not deliver a certified copy of the same, with the notice, to the officer, nor that the officer did not serve the same on the defendant town in the manner he has officially certified in his return. The act of 1864 requires that a copy of the order of removal, certified by the justices, and the notice prescribed in that act, shall be served on the overseer of the town to which the pauper is ordered to be removed, in the same manner writs of summons are by law required to be served.

The parties to an ordinary writ of summons or attachment, are concluded by the officer's return as to the manner of the service, and the return cannot, as between them, be contradicted or explained by extraneous evidence, or by the copy left by the officer. *White River Bank v. Downer & Tr.* 29 Vt. 332; *Witherell v. Goss & Delano*, 26 Vt. 748; 2 Saund. 148 c. The party is left in such cases to his action against the officer for any falsity in the return. *Hawks v. Baldwin & Co.* Brayt. 85. In an action



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against the officer, his return is *prima facie* evidence of the facts therein contained. *Barrett v. Copeland*, 18 Vt. 67. In *Witherell v. Goss & Delano*, Judge ISHAM uses this language: "The true principle governing the case is this; wherever there is sufficient privity to enable a party to sustain an action against an officer for a false return; that return is conclusive in the proceedings under which it was made, and the party injured is driven to his action against the officer; but as to third persons, where no such privity exists, and no such action can be sustained, the return is not conclusive." By this rule, which we think is the true rule in such cases, the officer's return is conclusive evidence that he served a copy of the order of removal, certified by the justices, and the notice, on the overseer of the poor of the defendant. At least, it is *prima facie* evidence of such service. We need not go so far as to hold that the officer's return is conclusive evidence as to the manner and kind of service, for there is nothing in the files in the county court, to which this court is referred, to rebut the *prima facie*, not to say conclusive, evidence furnished by the officer's return, of the truth of the service therein stated. The result is, that the facts relied upon by the defendant as the first ground for quashing the order of removal, though sufficient if proved, are not found by the county court, nor was there any evidence before that court from which to find such facts.

The judgment of the county court is reversed, the motion to quash overruled, and the cause remanded.

## THE TOWN OF WINHALL v. THE ESTATE OF FRANCIS D. SAWYER.

*Survivorship of Actions.*

An action upon the statute, for transporting a pauper from one town in this state to another town in this state, or aiding therein, without an order of removal, with intent to charge such town with the support of such pauper, does not survive under §§ 10, 12, ch. 20, of the Gen. Stat.

APPEAL from the decision and report of the commissioners upon the estate of Francis D. Sawyer, disallowing the plaintiff's claim against said estate.

The plaintiff filed a declaration in the probate court in two counts. The first count alleged that, "on the first day of April, A. D. 1868, said Sawyer brought one Lucy Cook, a poor and indigent person, then and there residing in said Townshend, from said Townshend to said Winhall, with intent to charge the said town of Winhall with the support of the said Lucy, and without an order of removal, as provided by law, and said Lucy had no legal settlement in said town of Winhall, by means," &c. The second count was for aiding and assisting in bringing the said Lucy to the said town of Winhall as aforesaid, with like intent.

In the county court, the defendant moved to dismiss said appeal, because the action did not survive. At the September term, 1872, the court, BARRETT, J., presiding, *pro forma*, sustained the motion and dismissed the appeal; to which the plaintiff excepted.

*Waterman & Read*, for the plaintiff.

This is an action on the case under § 31, of ch. 20, of the Gen. Stat. The clause of the statute upon which this action is founded, is purely remedial, and gives a remedy for the redress of a civil wrong. *Calais v. Hall*, 11 Vt. 494; *Barnet v. Ray et al.* 33 Vt. 205; *Sheldon v. Fairfax*, 21 Vt. 102. The action is brought to recover the damages the town has suffered by being compelled to support the pauper, unlawfully brought into the town by the intestate.

This action survives by the provisions of § 10, ch. 52, of Gen. Stat. Our statute has been repeatedly declared by this court as

identical in construction with the English statute of Edw. III., and entitled to the same beneficial interpretation. *Adm'r of Copeland v. Barrett*, 20 Vt. 244; *Burgess v. Gates, Ex'r*, lb. 326; *Dana, Adm'r, v. Lull*, 21 Vt. 383; *Bellows v. Adm'r of Allen*, 22 Vt. 108; *Manwell, Adm'r, v. Briggs*, 17 Vt. 176.

The rule for determining the question of survivorship under the English statute, when the personal representative is plaintiff, is, whether an injury has been done to the personal estate of the deceased. *Wheatley v. Lane*, 1 Saund. 216 a, and note by Serjt. Williams, and cases cited. By our statute, remedies by and against administrators are reciprocal, so that an action which would survive in favor of the personal representative, survives against him. Gen. Stat. ch. 52, § 12.

The question then, is, was this action brought to recover for pecuniary loss or damage that resulted to the plaintiff from the act of the intestate, for which a remedy is provided by law? If so, it survives. The unlawful act of the intestate, and the pecuniary loss the town has suffered thereby, are set forth in the declaration, and the remedy pursued which the statute points out for the recovery of such damages. The remedy, only, is statutory. That being followed, this case stands, as to survivorship, on the same ground as any other action for the recovery of damages directly resulting from the wrongful act of another, where the remedy is not given by statute.

*Field & Tyler*, for the defendant.

This is an action *ex delicto*, both in form and substance, and clearly does not survive at common law. 1 Chit. Pl. 57; *Adm'r of Barrett v. Copeland*, 20 Vt. 244. The rule is also well stated in 1 Cowp. 371; 13 Mass. 454; 9 Wend. 29.

There is no provision in our statute that keeps alive the action to recover the penalty under § 31, of ch. 20; and if the action to recover damages is preserved, it must be by the last clause of § 10 of ch. 52. But this clause only relates to actions of trespass and trespass on the case for damages done to real and personal estate. The case of *Adm'r of Barrett v. Copeland*, is a direct authority that this action is not saved by the above mentioned

clause of the statute ; and it seems to us that the case of *Dana, Adm'r, v. Lull*, 21 Vt. 383, fully recognizes the authority of the latter case, as well as the doctrine that when the action is in form and reality *tort*, no pecuniary benefit accruing to the defendant, it does not survive, unless for damage done to some specific property. Serjeant Williams's note to *Wheatley v. Lane*, 1 Saund. 216, which the court rely upon in *Bellows v. Allen*, seems to sustain the same doctrine. The passage from Williams's note, quoted by the court in *Bellows v. Allen*, follows the statute of 4 Edw. III., which evidently goes further than our statute. The supreme court of Massachusetts, under a statute like our own, have held the doctrine above claimed. *Read v. Hatch*, 19 Pick. 47.

This cannot be construed to be an action *ex contractu*, for damages ; it does not appear that any benefit accrued to the defendant by his wrongful act ; nor can it be claimed that any damage accrued to the *personal estate* of the plaintiff town.

The opinion of the court was delivered by

Ross, J. The plaintiff appealed from the disallowance by the commissioners on the estate of Francis D. Sawyer, of a claim presented by it against said estate. In the county court, it filed a declaration in two counts. The first count alleges that the intestate brought one Lucy Cook, a poor and indigent person, who had not her legal settlement in Winhall, to Winhall, with the intent to charge that town with her support, without any order of removal therefor, by means of which, the town had been compelled to expend the sum of five hundred dollars for the support of said Lucy. The second count is like the first, except that it charges that the intestate aided and assisted in bringing said Lucy to Winhall with like intent. . The county court, on the motion of the administratrix, held, *pro forma*, that the action did not survive, and dismissed the same. The only question presented is in regard to the correctness of this ruling of the county court. By § 12 of ch. 52, Gen. Stat., actions which survive in favor of an estate, survive against an estate. This action is for a tort, and would, at common law, have died with the intestate. If this action survives, it is by force of that part of § 10,

of ch. 52 of Gen Statutes, by which executors and administrators are allowed to maintain "actions of trespass and trespass on the case for damages done to real or personal estate," in connection with § 12 of the same chapter, allowing the same actions to be prosecuted against executors and administrators, or by presenting the claim before commissioners.

Was the alleged injury one done to the personal estate of the plaintiff, within the meaning of the statute? The bringing of the pauper into the town of Winhall, wrongfully, and with the intent to charge that town with the support of the pauper, did not injure or destroy any specific article of personal property belonging to the town, nor did it take away or lessen any right to any personal property vested in the town. It added one to the number of paupers which the town must support, and caused the town to take money by taxation from the citizens, that it might appropriate it for the support of the pauper. If the claim made by the plaintiff, that the personal estate of the citizens of the town is, when taken by taxation for the use of the town, the personal estate or property of the town, is admitted, the plaintiff would not stand any better than an individual, who, by the like wrongful act of the intestate, should be obliged to take some portion of his personal property and expend it for the support of the pauper. Could such an individual, under the circumstances stated, maintain an action by force of the statute against the intestate's estate? We think not. The statute under consideration has been before this court on several occasions. In *Adm'r of Barrett v. Copeland*, 20 Vt. 244, the court held the action did not survive. The facts in that case were these; Copeland was constable of Middletown, in the county of Rutland, and had an execution in his hands against the body of Barrett. He made a return upon the execution, that he arrested Barrett at Middletown, that Barrett escaped, and he retook him at Bennington, on fresh pursuit, where he would have had no authority to have made the arrest. Barrett brought an action against him for an assault committed at Bennington. On the trial, Copeland introduced the execution and his return, which the county court held to be conclusive evidence in his favor, and he obtained a verdict, which however

was set aside by the supreme court. Before another trial, Barrett died and the suit abated. The administrator of Barrett then brought an action on the case against Copeland for having made a false return on the execution, alleging that, by Copeland's use of his false return in the action of assault, the intestate had been defeated in that action, and had thereby been put to expense and damage. The gravamen of the action was that the intestate had been compelled to use some portion of his estate in paying the expenses in that action, by reason of Copeland's having made the false return, and that thereby the estate of the intestate had been lessened. It is difficult to distinguish in principle that case from the case at bar. In that case, the intestate had been compelled to pay out money and thereby lessen his estate, by the making of the false return, the wrongful act set up in that case. In the case at bar, the plaintiff has been obliged to raise money by taxation, from its citizens, and pay out the same for the support of the pauper, by the wrongful act of the intestate, in bringing, or aiding in bringing, the pauper into Winhall without an order of removal. The correctness of the decision on the facts in *Adm'r of Barrett v. Copeland*, has never been questioned by this court that we are aware of. POLAND, J., in delivering the opinion of the court in *Dana, Adm'r, v. Lull*, 21 Vt. 383, while he criticises the reasoning of Judge BENNETT in *Adm'r of Barrett v. Copeland*, by which Judge BENNETT held that our statute was not to receive the same liberal construction as obtained under the statute of 4 Edw. III., says: "The decision of the court in that case we have no doubt was entirely correct, though some of the expressions used by the judge in giving the opinion, if they are to be understood in the most extended signification, would narrow and limit the survivorship of action beyond what we should be disposed at this time to hold. The action in that case was, not only in form, but in reality, for a tort; and although it was against the defendant as an officer, still, we think the case a very different one from a case like the present where the action is *ex delicto* in form merely. Indeed, we think the cause of action in the case of *Adm'r of Barrett v. Copeland*, could not have been holden to survive under the enlarged and liberal rule which obtained under the statute

of 4 Edw. III., which was, that all actions for injuries or wrongs, which were *directly* detrimental to the assets of the deceased, survived to his representative." Judge HALL, in giving the opinion of the court in *Bellows v. Adm'r of Allen*, 22 Vt. 108, says: "Having been present at the hearing of *Barrett v. Copeland*, I wish to say a few words further in regard to that case. I concurred in the decision, without reference to any supposed distinction applicable to that case, between our statute and that of 4 Edward III. I thought that action did not survive under the English statute, and think so now." These two later cases, instead of revoking the authority of *Adm'r of Barrett v. Copeland*, on the facts in that case, recognize that case as having been correctly decided, and confirm it as the law applicable to such cases. The only question these later cases raise in regard to the decision in that case, is, as to the correctness of the doctrine announced by Judge BENNETT in delivering the opinion, that, in order for a tortious action to survive under the statute, it must be brought "to recover for damages done to some specific property." The two later cases hold that in the words, "personal estate," as used in the statute, is included every description of property not coming under the denomination of real estate, so that the statute applies and furnishes a remedy for injuries done to the rights and credits of a testator or intestate, as well as to his specific goods and chattels; but these cases hold, with the case *Adm'r of Barrett v. Copeland*, that the statute applies and keeps alive an action only for injuries done directly to the personal estate of a testator or intestate, giving to the words, "personal estate," this enlarged signification. Where the tortious act simply affects the personal estate indirectly, for instance, by inducing a testator or intestate to pay money, or to sell goods to a person unworthy of credit, whereby his goods are lost, although his estate is thereby lessened, the action does not survive by force of the statute. This is in conformity with the decisions in Massachusetts under a similar statute. *Read v. Hatch*, 19 Pick. 47.

Judgment of the county court dismissing the appeal for the reason the action does not survive, is affirmed, and the same is to be certified to the probate court.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF WINDSOR,  
AT THE  
FEBRUARY TERM, 1873.

PRESENT :

HON. JOHN PIERPOINT, CHIEF JUDGE.  
HON. ASAHEL PECK,  
HON. HOYT H. WHEELER, } ASSISTANT JUDGES.  
HON. JONATHAN ROSS,

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J. R. ALLEN v. S. L. THOMPSON.

*Exemption from Attachment.*

A barber's chair and foot-rest, used by a barber in his business, are exempt from attachment.

TRESPASS for a barber's chair and foot-rest. Plea, the general issue, with notice of justification. Trial by the court, December term, 1872, BARRETT, J., presiding.

It was conceded that the plaintiff was entitled to recover, unless the articles sued for were subject to attachment and execution. It was also conceded that the justification was made out, unless the articles were exempt from attachment and execution under



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Allen v. Thompson.

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the statute. The only question was, whether they were so exempt. The plaintiff was, at the time the articles were attached, and for sixteen months had been, a barber in Ludlow village, keeping a shop in which said articles were used by him in said business, and they were customary and necessary articles for use in carrying on said business, and the only ones the defendant had or owned. They were worth twenty dollars at the time they were attached. The court, *pro forma*, rendered judgment for the plaintiff to recover that sum, and interest from the time of taking by the defendant. Exceptions by the defendant.

*Gilbert A. Davis*, for the defendant, cited No. 39 of the Acts of 1866; *Kilburn v. Demming*, 2 Vt. 404; *Spooner v. Fletcher*, 3 Vt. 133; *Garrett v. Patchin*, 29 Vt. 248; *Henry v. Sheldon*, 35 Vt. 427, 429; *Buckingham v. Billings*, 13 Mass. 82; *Danforth et al. v. Woodward*, 10 Pick. 423; *Batchelder v. Shepleigh*, 1 Fairf. (Me.) 135; *Meyer v. Meyer*, 28 Iowa, 359, cited in Amer. Law Rev. of April, 1869, 476.

*Walker & Goddard*, for the plaintiff, cited *Kilburn v. Demming*, 2 Vt. 404; *Garrett v. Patchin*, 29 Vt. 248; *Dunlap v. Edgerton*, 30 Vt. 224; *Henry v. Sheldon*, 35 Vt. 427; *Howard v. Williams*, 2 Pick. 80; 5 Allen, 43.

The opinion of the court was delivered by

Ross, J. The only question raised by the exceptions is, whether a barber's chair and foot-rest are exempt from attachment and levy of execution, under the provisions of the statute which exempts "such suitable tools," &c., as are "necessary for upholding life." The case finds that the articles are necessary for the barber to use in carrying on his business. The only question then, is, are they tools within the meaning of the statute? Under the rule laid down by the court in *Spooner v. Fletcher*, 3 Vt. 133, relied upon by the defendant, we think the articles are tools within the meaning of the statute. In that case it is said: "It is evident the legislature intended to limit, so far as they could, the amount of each class of property which would have a

general application to the wants of poor people; as, 'one cow, ten sheep.' &c.; but no limitation or description could be given of *tools*, the variety being so great; therefore, it is left to courts to construe, and apply the construction to cases as they may arise. Hence it has been considered that implements used by blacksmiths might be classed under the term *tools*, as used in this act, being few in number, small in value, simple in construction, and operated by direct application of manual strength; and this has been thought going quite far enough, as there may be some doubts as to the anvil and bellows being *tools*." The tools of a barber are few in number, small in value, and simple in construction. The chair in which he places his customers, to hold them in a convenient position to be operated upon, is adjustable by raising and lowering the head-piece. It is operated by direct application of manual force. It is used in almost every operation he performs while at work at his trade. It is quite as much a *tool*, as the blacksmith's anvil, or vise, the shingle-maker's shaving-horse, the wood-sawyer's saw-horse, the photographer's head-rests, the shoemaker's bench, or the carpenter's tool-chest, or portable work-bench, and many other implements used to hold a mechanic's work in a convenient and suitable position to be operated upon.

Judgment affirmed.

#### DANIEL A. BATES v. THE TOWN OF SHARON.\*

##### *Evidence. Highway. Exceptions.*

When the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, the witness is allowed, to a certain extent, to add his conclusion, judgment, or opinion.

If a town is excusable for delaying the repairs of a defective highway, because impracticable to repair until the frost is out of the ground, it is the duty of the town, in the meantime, especially when practicable, to provide a side-way around the defective place, with proper barriers and guides to indicate to travelers that the side-way is temporarily substituted for the highway.

\* This case was decided at the February term, 1872.

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But whether it can be assumed as matter of law, or not, that such duty rests upon a town, it would be error for the county court to assume as matter of law that it does not, and the refusal of a request to charge, requiring such assumption, is not error. If the charge be as favorable to a party as he has a right to have it, he cannot except to it, although not strictly correct.

CASE for damage sustained by reason of the insufficiency of a highway. Plea, the general issue, and trial by jury, December term, 1871, BARRETT, J., presiding.

The plaintiff introduced evidence tending to prove, that on the afternoon of the first day of April, 1870, he was passing through the town of Sharon, along the highway on the north side of White River, driving a span of heavy team horses, which he had purchased the day before in Barre, and that his off horse got into some gullies in the highway, caused by the water running across the highway, and thereby received an injury which caused him to be lame by spells ever since in one of his hind legs: that after getting through the gullies, he drove his horses to White River Village, a distance of about fifteen miles, and put up for the night, and did not notice that his horse was lame until the next morning; that he drove the horses that day from Williamstown, a distance in all of about forty miles: that upon discovering the lameness in his horse the next morning, he took one Orville Noyes, who lived at White River Village, with him, and went back to Sharon and notified one of the selectmen, and examined the road; that for a few rods in the road at the place of the alleged injury, there were several gullies, some of them extending across the entire traveled part of the road, and were much deepest on the lower, or river, side of the road, two or three of them being two or three feet deep on the lower side, and gradually growing more shallow as they extended into and across the road.

The plaintiff lived in Fitchburg, Mass., and had never passed over the road before. He testified that he discovered the gullies in the road before he got to them, and got out and examined the road, but seeing no place to drive round, and noticing that teams had passed by, keeping on the upper side of the road, he got back into his wagon and drove his horses as rapidly as he could through this bad place in the road.

The plaintiff's counsel asked the plaintiff whether, from the appearance of the bad place in the road the day he examined it, it appeared to have been there recently, or some time before. To this question the defendant's counsel objected, but the court permitted the same. The plaintiff answered, "I should say from the appearance of it the next day, that it had been there several days."

The plaintiff's counsel asked said Noyes, who examined the road with the plaintiff the next day, whether the gullics had the appearance of having been washed out recently or not. To this question the counsel for the defendant objected, but the court permitted the same. The witness answered, "I should think they had been there, from the appearance, for several days." To the admission of said questions and answers, the defendant excepted. This testimony was given on the part of the plaintiff, in chief.

The defendant gave evidence tending to prove, that at the place in the highway where the alleged injury occurred, in the freshet of October, 1869, the river washed out the entire road for a few rods, and it was repaired that fall by filling up partly, and by extending the road further into the adjoining field, but the road remained directly on the bank of the river; that the soil was sandy and liable to wash, and that while they were repairing this road in the fall, a side-road was made into the adjoining field around this place; that on the day of the alleged injury, all the roads in town, and in adjoining towns, were in bad condition, and had been for some days, as the snow was melting and running off, and the frost coming out of the ground; that a portion of the water from the melting snow on the adjoining field necessarily ran across the road at this place, and could not be prevented, and that it unavoidably washed the road, and could not be prevented, or the road repaired, until the frost was out of the ground; that the highway surveyor of the district examined the road on Tuesday or Wednesday previous to the alleged injury, which was on Friday of the same week, and found that the frost was coming out of the ground, and that the road was washing, and concluded it best to divert the travel from it, and therefore fixed the approaches to the side-road around this place, which was used the fall before, so that the travel could pass around this place, and put a board across the highway near the point of divergence at the upper side, and a pole at the lower, or down river, side, each placed about three feet from the ground; that the surveyor had no knowledge that the highway was washing, or out of repair, until the day he thus fixed it, and the selectmen of the town had no knowledge of the same until after the alleged injury; and there was no testimony that the road had begun to wash or gull out previous to the day that the surveyor diverted the travel as aforesaid; that after that, the travel, to some extent, took the side-road. But it appeared in evidence that the day before the alleged injury, the barriers erected by the surveyor were down, but how, or when they came down, did not appear, and that the board at the upper end lay across the road where it lay the day of the alleged injury, and the

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travel passed over it, and kept along on the upper side of the highway. The testimony tended to show that the highway surveyor had no knowledge of this until after the alleged injury. Also, that the first day of April was quite warm in the middle of the day, as was the day before, and a few days previous, and freezing at night, and that the snow was melting rapidly, and the frost rapidly coming out of the ground. The plaintiff introduced a witness who passed over the road on foot on Thursday, the last day of March, in the afternoon, who testified that the snow-water was running across the road freely at this point, and was gullying the road pretty fast. The plaintiff testified that there were no barriers across the road, and that he did not notice the board which lay across the road at the upper end.

The defendant requested the court to charge the jury as follows:

1. "If the jury find that the town, by their highway surveyor, had provided a way to pass around the gullies in the highway, in the manner the testimony tends to prove, the defendant is not guilty of a want of ordinary care, and is not liable in this case to the plaintiff.

2. "If the jury find that the plaintiff knew of the defects in the highway, and got out of his wagon and examined the highway at that point, and saw fit to drive over the road thus defective, rather than pass around by the way provided by the town, he drove at his own risk, and the town is not liable.

3. "That the town is not liable in this case, unless the jury believe that, under the circumstances proved, the town ought to have repaired the defect in the highway before the accident happened, and had reasonable opportunity to do so; and that if the town could have had no such notice and reasonable opportunity as would have enabled them to repair it, the defect was not one for which the town is liable.

4. "If the accident was occasioned in any degree by the plaintiff's want of ordinary care and prudence, he cannot recover.

5. "That a traveler upon the highway is held to a higher degree of care when the roads are bad in the spring of the year, than at other seasons of the year, when the highways are usually good."

The court charged fully in relation to all aspects of the case, and satisfactorily in respect to all the defendant's requests, except the third. As bearing on that, the court called the attention of the jury to the conceded fact, that the place in question was bad and out of repair, and that the plaintiff himself saw its actual

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condition before he undertook to go through it. Also to the evidence that the town had opened a side-way through the field around that bad place, feasible and sufficient for traveling in safety. Also to the evidence, *pro* and *con*, whether it was made sufficiently obvious, either by the manner of its connection with the main road, or by guides put up to indicate it, so that the plaintiff would have seen it by the exercise of proper care and outlook under the circumstances; and in that connection the court instructed the jury, if the town had provided such a way, and had made it thus obvious, it had relieved itself from liability to the plaintiff in respect to that bad place in the road; that if the town had not so done, then the question was, whether the plaintiff, in view of the bad place, which was known to him before he undertook to go through it, was in the exercise of such care and prudence as prudent men in his circumstances would exercise, in undertaking to go through it at all; explaining to the jury how the condition of a road may be such that no emergency of travel would justify undertaking to drive over it; and that unless they should find that he was in the exercise of such care and prudence, he could not recover; that, if he did exercise such care and prudence, then the question would be, whether in his management and manner of driving in going through, he was in the exercise of proper care and prudence. If they should not find that he was, then he could not recover. If he did exercise such care and prudence, then he could recover, if in other respects his case was made out by the proofs.

The court, in course of the charge, in effect, instructed the jury that, on the conceded facts, the town was in no default, so far as the plaintiff was concerned, in the matter of indicating to him the bad place, nor in not doing more to warn him from going through it; for the reason that he saw it all before he got to it, and got out of his wagon and examined it before undertaking to go through it.

Inasmuch as the highway surveyor, on Tuesday or Wednesday before the alleged accident, was aware of the defective condition of the road, and according to his own testimony, then prepared a feasible and safe way around the bad place, for public travel, and had put up barricades at each end of the bad place, the court did not instruct the jury one way or the other as to the duty of the town in respect to the repair of that bad place, under the circumstances shown by the defendant's evidence, that was uncontradicted, or that it was liable by reason of not having so done, but put the case to the jury solely on the question whether the side-way was so prepared and pointed out as above expressed; and if

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not, then on the two questions above stated as to the exercise by the plaintiff of proper care and prudence.

The defendant excepted, not to the charge as given, but to not charging according to the third request otherwise than is above shown. Verdict for the plaintiff.

*W. C. French*, for the defendant.

I. The facts show that the town is not liable for defects in this highway, under the circumstances, and that the plaintiff, when he undertook to pass over this defective road, did so at his own risk.

1. It is well settled that towns are not *insurers* against all accidents and injuries caused by defects in their highways. *Prindle v. Fletcher*, 39 Vt. 255; *Clark v. Corinth*, 41 Vt. 449; *Hubbard v. Concord*, 35 N. H. 52; *Palmer v. City of Portsmouth*, 43 N. H. 265; *Morse et ux. v. Abbott*, 32 Me. 46.

2. The liability of towns for the want of repair of their highways, proceeds on the ground of *negligence* and *fault* on their part in not repairing them. If they are in no *fault*, they are not liable. See cases *supra*, and Angell on Highways, § 268; *Wood v. Waterville*, 4 Mass. 423; *Rice v. Montpelier*, 19 Vt. 470.

3. If one has reasonable ground to believe a highway unsafe, it is not an act of prudence in using it, and he cannot recover for an injury received upon it. *Briggs v. Taylor*, 28 Vt. 180, 183; *Fulsom v. Underhill*, 36 Vt. 580.

4. When highways are out of repair, it is the duty of towns to adopt suitable precautionary measures to protect travelers *during the night time*. Travelers by day ordinarily need no such precautions. *Kimball v. Bath*, 38 Me. 219.

II. The court should have instructed the jury according to the defendant's third request. The request was drawn in the language of the supreme court of New Hampshire in the leading case of *Hubbard v. Concord*, *supra*, where the law was held as claimed by the defendant in this case, in an able opinion by SAWYER, J. The same rule has been held in *Johnson v. Haverhill*, 35 N. H. 74; *Palmer v. City of Portsmouth*, *supra*; *Chamberlin v. Enfield*, 43 N. H. 356; *Howe et ux. v. Plainfield*, 41 N.

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H. 135; *Farnum v. Concord*, 2 N. H. 392; and is recognized in Maine and Massachusetts. *Frost v. Portland*, 2 Fairf. 271; *Kimball v. Bath*, *supra*; *State v. Fryburg*, 15 Me. 405; *Howard v. North Bridgewater*, 16 Pick. 189; *Adams v. Carlisle*, 21 Pick. 146; *Tisdale et ux. v. Norton*, 8 Met. 388. And we claim the question has been settled in this state in *Prindle v. Fletcher*, 39 Vt. 255, and *Clark v. Corinth*, 41 Vt. 449.

III. It is the duty of the court to instruct the jury upon all questions of law raised by the issue or by the testimony on trial, when requested, or without request. The court should have given the jury proper instructions as to the duty of the town in relation to the repairs of this highway. *Brainard et al. v. Burton et al.* 5 Vt. 97; *Wetherbee v. Foster*, *Ib.* 136; *Briggs v. Georgia*, 12 Vt. 60; *Vaughan v. Porter*, 16 Vt. 266; *Campbell v. Day*, *Ib.* 558; *Whitney v. Lynde*, *Ib.* 579; *Hazard v. Smith*, 21 Vt. 123.

IV. The opinion of the plaintiff, and of the witness Noyes, as to the length of time the gullies had been there, was improperly admitted. 1 Greenl. Ev. § 440. The opinion of non-professional men may be given in connection with the facts observed by them, when, "from the general and indefinite nature of the inquiry, it is not susceptible of direct proof," as in cases of insanity, or as to the insolvency of a person. *Lester v. Pittsford*, 7 Vt. 158; *Davis v. Fullers*, 12 Vt. 178; *Cram v. Cram*, 33 Vt. 15; *Hard v. Brown*, 18 Vt. 87; *Sherman v. Blodgett*, 28 Vt. 149; *Richardson v. Hitchcock*, *Ib.* 757.

*S. E. & S. M. Pingrey*, for the plaintiff.

The objection to the questions put to the plaintiff and to the witness Noyes, is not well grounded. If the questions were objectionable at the stage of the trial when put, the objection was obviated by the subsequent concession on the part of the defendant, of the fact of notice.

The defendant's third request, under the circumstances of the case, was absurd.

It was conceded that the road was in bad condition the Tuesday or Wednesday before the injury, and that the town then had notice. It also appeared from the defendant's testimony,



that the washing out of the gullies could not be prevented, nor the bad place repaired, until after the frost was out of the ground. Therefore, the "reasonable opportunity" to repair, from their own showing, could not exist until an indefinite future time, when the frost would be out. The request suggests no duty to be done by the town while thus waiting for the frost to leave the ground; no side-road is suggested; no fencing up of the bad place; no indicia to warn the traveler of it, or to invite him to the side-road.

The opinion of the court was delivered by

PECK, J. The question put to Noyes by the plaintiff's counsel, whether the gullies had the appearance of having been washed out recently or not, and his reply, that he should think they had been there, from the appearance, for several days, and a similar answer from the plaintiff to a like question, were proper. The general rule is, that the opinions of witnesses, except upon questions of art, science, and skill, are not admissible. But the rule has its exceptions. Where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusion, judgment, or opinion. The evidence comes within this exception to the rule.

On the question pertaining to the charge, the defendant's counsel has entered upon a discussion much beyond the scope of the case presented by the exceptions. It is only necessary for the court to decide the question involved in relation to which the defendant took exception at the trial. The case states that "the defendant excepted, not to the charge as given, but to not charging according to the third request" otherwise than as shown by the exceptions. The third request to charge was this: "That the town is not liable in this case unless the jury believe that, under the circumstances proved, the town ought to have repaired the defect in the highway before the accident happened, and had

reasonable opportunity to do so ; and that, if the town could have no such notice and reasonable opportunity as would have enabled them to repair it, the defect was not one for which the town was liable." This request assumes as matter of law that if the town had not had reasonable opportunity to repair the defect in the highway before the accident happened to the plaintiff, the town is not liable, and that the verdict should be for the defendant, irrespective of whatever else the jury might find from the evidence in the case. This ignores, or completely repudiates, the idea of any obligation on the part of the town to put up and maintain across the road a barrier to warn travelers that the road at the defective place in question, by reason of its dangerous condition, was not to be traveled ; and to provide a side-way, with proper guides to turn the travel from the dangerous place in the road, and to direct it to the side-way. If the county court had charged according to the third request, they could not, without having the charge repugnant, have recognized in the charge this duty on the part of the town, as they did, to provide a side-way, with proper guides put up to indicate to travelers that it was substituted for the time being, for the highway around the defective place. The accident to the plaintiff happened on the first day of April, on Friday. The evidence on the part of the defense was, that the highway surveyor of the district, on the Tuesday or Wednesday next before the accident, examined the road at the place in question, and found it washing out ; and concluded it best to divert the travel upon a side-way which he opened for that purpose, where the side-way had been used the fall before, when this same piece of road was out of repair, in the field around this bad place. The theory of the defense, so far as it relates to the omission of the town to repair the few rods of road in question, is, that it was impracticable to do it until the frost should come out of the ground ; and hence that the town had not had reasonable time to repair it. It is conceded in argument that it was not claimed at the trial that the road was in sufficient repair. If the town was excusable upon this ground for thus delaying the repairs, it is manifest that it was the duty of the town to provide a side-way in the meantime, and turn the travel off the

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highway, around the bad place, especially as it appears that it was practicable to do so. But whether it can be assumed as matter of law that such was its duty, or not, it would have been error for the court to have assumed as matter of law that no such duty rested upon the town, as they must have done if the defendant's third request had been granted. Upon this ground the defendant's request was properly denied.

Upon another ground it is manifest that there was no error in the denial of this request, of which the defendant can complain. The court left it to the jury upon the evidence, to say whether the town had properly performed its duty in the manner in which it provided the side-way and guided the travel upon it; and in that connection told the jury that if the town had provided such a way, and had made it sufficiently obvious to the traveler, *it had relieved itself from liability to the plaintiff in respect to that bad place in the road.* Whether this is strictly correct or not, it is not a proposition to which the *defendant* has a right to object. This charge excused the town from all liability for the defect in the highway, if the town had done its duty in the matter of providing a side-way, and properly indicating it to the traveler. The defendant clearly could require no more than this.

Judgment affirmed.

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JAMES BRYANT v. MERCY P. CLARK.\*

*Voluntary Payment.*

The plaintiff voluntarily, and without the request of the defendant, paid taxes assessed on real estate in the possession of the defendant, who had the equitable title thereto, but the legal title of which was in the plaintiff, who claimed to own the equitable title also, and denied the title of the defendant, and her right of possession. *Held*, that the plaintiff could not recover of the defendant for the money thus paid.

ASSUMPSIT. Plea, the general issue, and trial by the court, May term, 1871, BARRETT, J., presiding.

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\* This case was decided at the February term, 1872.

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The plaintiff claimed to recover for an alleged breach of contract to deliver saw-logs, and the court ruled that the plaintiff could not recover therefor ; but no question was made in this court as to the correctness of that ruling.

The plaintiff also claimed to recover for taxes paid by him on certain real estate described in a deed from him to the defendant, delivered as an escrow, dated June 2, 1866, which were assessed after the date of said deed, and before the delivery thereof, which was made on the 15th of July, 1869, in obedience to a decree of the court of chancery dated July 12, 1869. The defendant was in possession of said premises from the date of said deed, claiming the rights thereto which were accorded to her by said decree. The plaintiff refused the delivery of said deed to the defendant, claiming that the title of said premises was legally and equitably in him, and that the defendant had no title, or right of possession. The plaintiff paid said taxes as owner of said premises, voluntarily, without the request of the defendant. The collector never called upon the defendant for the payment thereof ; nor did the plaintiff, prior to the commencement of this suit, inform the defendant of the amount paid by him, or request her to pay the same. The other facts are sufficiently stated in the opinion of the court. Judgment for the defendant, *pro forma*, and exceptions by the plaintiff.

*Sewall Fullam*, for the plaintiff.

The defendant was in the possession and use of the lands taxed, claiming them in equity : the plaintiff had the legal title, and denied the defendant's equity ; but the court of chancery awarded the lands to the defendant. During this controversy, the plaintiff paid the taxes, which were assessed to him, but which the defendant in equity was bound to pay. If the action lies for money which *ex equo et bono* the defendant ought to refund, or for money paid by mistake, it is difficult to see why the plaintiff should not recover. But, it is said, the plaintiff did not demand payment before suit brought. The defendant knew she did not pay the taxes, and that the plaintiff had the legal title,—therefore, notice to her of the payment of the taxes by the plaintiff is to be presumed.

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*F. C. Robbins* and *W. C. French*, for the defendant.

The plaintiff paid the taxes of his own wrong, and cannot recover therefor. A demand was necessary before suit brought. Buller N. P. 147; *Hall & Chase v. Peck & Co.* 10 Vt. 474; *Mattocks v. Lyman et al.* 16 Vt. 113, 118; S. C. 18 Vt. 98. This question is *res judicata*, and was conclusively settled in the chancery suit. 2 Parsons Cont. 234; 2 Kent Com. 120.

The opinion of the court was delivered by

PECK, J. No question is made by the plaintiff's counsel in relation to the ruling of the county court against the claim of the plaintiff for the alleged breach of contract for the delivery of the saw-logs.

The only question presented for the consideration of this court is, whether the county court erred in holding, upon the facts stated, that the plaintiff was not entitled to recover for the taxes paid by him upon the real estate mentioned in the exceptions, assessed while the title to the estate was in the plaintiff, and which was subsequently conveyed to defendant by the plaintiff in obedience to a decree in chancery, obtained in the suit of this defendant against this plaintiff. The facts make a case of voluntary payment on the part of the plaintiff, without request, and without promise of repayment on the part of the defendant. It cannot be regarded as a compulsory payment, since whatever supposed compulsion there was, was by the plaintiff's own voluntary procurement. Nor can the case, upon the facts, be brought within the principle applicable to the recovery for money paid by mistake. Even if a *bona fide* mistake on the part of the plaintiff in relation to his right to withhold from the defendant the title of the land, and denying her right to possession, could avail the plaintiff in this suit, no such mistake is found by the county court, and it cannot be inferred by this court; the intendment would rather be the contrary, and that he acted in his own wrong in the matter. Therefore, without looking into the particulars of the proceedings in the chancery suit, further than they are disclosed in the exceptions, there appears no legal ground on which to rest the plaintiff's claim to recover for the taxes paid by him. On in-

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spection of the proceedings in that cause, it appears, among other things, that June 2, 1866, the defendant paid the plaintiff two hundred dollars towards the consideration for the premises, and gave him her promissory note for one hundred and seventy-four dollars, on demand with interest, for the balance thereof; and at the same time the plaintiff executed a deed to the defendant of the premises; and the note and deed were deposited in the hands of Samuel Peabody for safe keeping, and to be delivered to the defendant on the payment of the note—that on the 10th October, 1866, the defendant tendered the amount of the note and interest to the plaintiff, and demanded the delivery of the deed and the note, which was refused by the plaintiff; whereupon this defendant commenced her bill in chancery mentioned in the exceptions. This plaintiff resisted that suit on several grounds; one of which was, that the note was to have been paid by July 1, 1866; also upon the ground that the fulfillment on the part of the defendant of the contract for the delivery of the saw-logs mentioned in the bill of exceptions, was a condition precedent to the delivery of the deed; and on the further ground that the parties had verbally rescinded the contract in relation to the conveyance of the land to the defendant. All these matters of defense failed upon the proofs in the case, and it appearing that the money tendered had been paid into court in that cause, this defendant had a decree for the unconditional delivery of the deed, and for costs of suit. The taxes in question were assessed pending that controversy; and although the mere payment of them by the plaintiff enured to the benefit of the defendant, and might seem to create an apparent equity in favor of the plaintiff, yet, viewed in connection with the assertion of the unfounded claim under which he made the payment, the whole together very likely was a detriment instead of a benefit to this defendant. And very likely this was the view the court entertained in the decision of the suit in chancery. In that case, this plaintiff alleged in his answer the payment of these taxes by himself, (at least, so much of them as had accrued at that time), and had the court thought it equitable, it might have been made a condition of the decree for the delivery of the deed to this defendant, that she should make the plaintiff good in

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the matter of these taxes. The omission of that court to make any such order in the chancery cause, leaves it to be inferred that the court, upon the whole case, did not consider that equity required it. If in equity this plaintiff is not entitled to recover for such payment, clearly he cannot recover at law. But if it be assumed that the court, in the decision of the cause in chancery, did not pass upon this matter, but intended to leave this plaintiff to his remedy at law, if any, the result is the same, as the record of the suit in chancery, at least, does not disclose any thing to aid the plaintiff in this action.

Judgment affirmed.

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JAMES A. BRYANT v. SAMUEL PEMBER.

*Sale without Fraud or Warranty. Evidence. Practice.*

It is no defense to an action upon a note given for the price of a cow, that the cow was worthless at the time of the sale, if the sale was without fraud or warranty on the part of the vendor.

The vendor exchanged a pair of horses for a mare and the cow for which said note was given. The defendant, for the purpose of showing fraud by the vendor in the sale of said cow to the defendant, and as tending to show his knowledge of her worthless condition, claimed on trial that the vendor gave little or nothing for said cow; and, as bearing upon that question, introduced evidence, against the plaintiff's objection, to show that said pair of horses was of small value. *Held*, that such evidence was too ind-finite to warrant an inference that the vendor knew the condition of said cow.

If a defendant claims judgment on the ground that he has proved a plea which is insufficient in law as a defense, he must, at least, prove as far as he does allege.

ASSUMPSIT upon a promissory note for fifty dollars, executed by the defendant, and payable to H. A. Bryant, or bearer. The defendant pleaded, first, the general issue; secondly, *actio non*,

“ Because he says that the note named in said first count, was given by this defendant to Hiram A. Bryant, named in said count as H. A. Bryant, for a cow bought by the defendant of said Hiram, which cow, at the time of said purchase and giving said note therefor, was sick, and of no value whatever, and soon after died; that on said sale, said Hiram represented said cow to be a good cow, and all right, when, as the said Hiram then knew, said

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cow was then of no value, and was sick ; and the defendant avers that said note was uncurrent and past due when it was transferred by said Hiram ; and this he is ready to verify," &c.

The third plea was like the second, except that the *scienter* was not alleged. All the pleas were treated at the trial as traversed. Trial by jury, December term, 1872, BARRETT, J. presiding.

It appeared that said note was given for the price of a cow which the defendant bought of said H. A. Bryant, who had obtained her the same day by exchanging a pair of horses with one Huntington for a certain mare and said cow. As bearing on the question of fraud by the said H. A. Bryant in the sale of the cow to the defendant, and as tending to show his knowledge of the condition of the cow at the time of said sale, the defendant claimed on the trial that said H. A. Bryant gave little or nothing for her, and on that question offered evidence to show that said pair of horses was of small value ; to which the plaintiff objected ; the court admitted the evidence ; to which the plaintiff excepted. The defendant claimed on the trial, and gave evidence tending to show, that he bought the cow expressly for a dairy cow, and that this was known to the said H. A. Bryant, and that he sold her as such ; that at the time of said sale to the defendant, the cow had a disease, of which she subsequently died, and of which the defendant was wholly ignorant, but supposed her to be sound and healthy, and that in consequence of said disease, she was worthless at the time of the sale.

The plaintiff claimed, and requested the court to charge, that if the said H. A. Bryant, at the time of the sale, was ignorant of any such disease, and sold the cow to the defendant without fraud or warranty, the fact that she was so diseased and worthless was no defense to the note. Also, that if the defendant took the cow, and kept her till she died (from July 20th to the last of the next September), and made no offer to return her, or to rescind the trade, he thereby affirmed the same, and was not entitled to question its validity. The court declined so to charge ; but charged that, if the cow was worthless as a cow, if in point of fact H. A. Bryant conveyed no value to Pember by the sale of the cow to him, there was no consideration for the note, and that would be a



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defense ; but that, on the other hand, if the cow was of any appreciable value when sold to the defendant, there was not such a want or failure of consideration as would constitute a defense to this suit. To the said refusal and charge, the plaintiff excepted. In all other respects the charge was full and satisfactory. It was conceded that the note in suit was transferred to the plaintiff after maturity, and that he knew for what it was given. Verdict for the defendant.

*J. J. Wilson*, for the plaintiff.

When a chattel is sold without fraud and without warranty, the vendor is not liable for any latent defect. Chit. Cont. 466, note 1 ; 2 Kent Com. 485 ; 1 Swift Dig. 383 ; *Penniman v. Pierson*, 1 D. Chip. 394 ; *Barrett v. Hall*, 1 Aik. 269 ; *Stephens v. Smith*, 21 Vt. 90 ; *Paddock v. Strobbridge*, 29 Vt. 470 ; *Bond et al. v. Clark*, 35 Vt. 577 ; *Wallace v. Stone*, 38 Vt. 607 ; *Ricks v. Dilloharty*, 8 Porter, 133 ; *Sheppard v. Temple*, 3 N. H. 455 ; *Perkins v. Bomford*, Ib. 522 ; *Bluett v. Osborne et al.* 1 Stark. 384 ; *Parkinson v. Lee*, 2 East, 314 ; *Ormsod v. Heath*, 14 M. & W. 651 ; *March v. Pigott*, 5 Burr. 2802 ; *Boman v. Boman*, 8 Conn. 409 ; *Swett v. Colgate et als.* 20 Johns. 196 ; 2 Caines, 48 ; 25 Me. 337 ; 1 N. H. 179 ; 1 Wend. 185.

Could the defendant recover back if he had paid ? The vendor of a note without endorsement, can collect the agreed price, notwithstanding it turns out that the note at the time of sale was worthless. Chit. Bills, 76, 77, note ; Bayley Bills, 2d Am. ed. 537, 538.

In this case there was no failure of consideration. The consideration for the note was the cow *as she was*, and if the defendant wished to protect himself against latent defects, he could have required a warranty. *Paddock v. Strobbridge*, *supra* ; *Parkinson v. Lee*, *supra* ; *Wallace v. Stone*, *supra*.

The defendant did not offer to rescind. 32 Vt. 1 ; Ib. 179 ; 33 Vt. 249.

*Hunton & Gilman*, for the defendant.

In respect to the first exception. It is alleged in the second plea, that H. A. Bryant knew the cow was of no value. We sub-

mit that, under that plea, it was relevant to show that the horses, on the sale of which he obtained the cow, were of little value, and that there is no error in admitting the testimony. Under the charge, it became wholly immaterial.

There is no error in the charge, that if the cow was of no value at the time of the sale, that that is a defense to the note. It sustained the third plea. *Hurd v. Spencer*, 40 Vt. 581; *Henry v. Martin*, 39 Vt. 42; *Foster v. Phaley et al.* 35 Vt. 303; *Craigin et al. v. Fowler et al.* 34 Vt. 326.

There was no error in the refusal to charge as requested in respect to there being no offer to rescind. *Kelley v. Pember*, 35 Vt. 183, 185.

The opinion of the court was delivered by

PECK, J. The charge of the court, "that if the cow was worthless as a cow; if, in point of fact, H. A. Bryant conveyed no value to Pember by the sale of the cow to him; there was no consideration for the note, and that would be a defense," treats the simple fact that the cow, by reason of a disease upon her at the time of the sale, was at that time worthless, as constituting a want of consideration which avoids the note. An entire want of consideration, or an entire failure of consideration, is a good defense to the entire note. The question is, whether the facts which the jury were required to find in order to find a verdict for the defendant, constitute either a want, or a failure, of consideration, within the meaning of the rule of law on this subject. Nothing appears in this case to take it out of the general rule, that in the purchase of a chattel, with no warranty or fraud on the part of the seller, it is at the risk of the buyer as to defects and unsoundness. In such case, whether the seller has received the price, or not, from the buyer, and the article turns out to have been unsound or defective at the time of the sale, even to the extent of rendering it worthless, the seller is not liable in an action for damages, or to recover back the price paid. If the stipulated price has not been paid, and the seller brings an action to recover it, the same rule applies as to which party should bear the loss resulting from such defects or unsoundness. So far

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as the article fails from a defect which is at the risk of the seller—as the want or failure of title of the seller, as to which there is an implied warranty on his part,—so far there is a want or failure of consideration. But if the failure of the article is by reason of a defect as to which the buyer takes the risk, there is no want or failure of consideration, in the legal sense of the rule, even if thereby the article is rendered worthless; as the buyer in such case gets and retains what he bought, that is, the property at his own risk as to such defect. The charge of the court was erroneous in this, that it treated the fact that the cow was worthless at the time of the sale, as a want or failure of consideration, and a defense to the note given for the stipulated price, without fraud or warranty on the part of the seller. The plaintiff was entitled to a charge on this point substantially according to the first proposition in his request.

As to the exception to the admission of the testimony objected to, the evidence offered and admitted appears to have been of a general and very indefinite character. Proof that the pair of horses, which H. A. Bryant gave in exchange for a mare and the cow, "*was of small value*," is too indefinite to warrant an inference that he knew the diseased condition of the cow. They might be of small value, and yet not sufficiently so relatively to warrant such inference. The evidence as stated falls far short of showing that he bought the cow at a price so trifling as to furnish evidence that he knew her diseased condition. We do not, however, intend to say that there might not be such a wide difference between the price paid, and the value if sound and free of fault, as to render the evidence admissible as a circumstance.

Under the exception to the charge, the defendant's counsel make the further point and claim, that whatever the law may be in relation to the necessity of proof of a warranty or fraud on the part of the seller, to constitute a defense to an action for the stipulated price, still, in this case there is no error in the charge of which the plaintiff can complain, insisting that it was correct as applicable to the third plea, which does not allege either a warranty or fraud on the part of the seller; claiming that the jury under the charge must have found the third plea proved. But

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this proposition is not tenable, as the third plea contains the allegation, among other things, that "in said sale, said Hiram [the seller] represented said cow to be a good cow, and all right." The charge of the court did not require this fact to be found by the jury in order to warrant a verdict for the defendant. This is a material allegation, yet the plea is insufficient for want of an allegation that the seller, at the the time of the sale, knew the cow was diseased. If a defendant claims judgment on the ground that he has proved a plea which is insufficient in law as a defense, he must at least prove so far as he does allege.

Judgment reversed, and new trial granted.

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L. CARLOS DAVIS, GUARDIAN OF ALMIRA PIERCE, v. THE TOWN  
OF PLYMOUTH.

*Competency of Witness.*

On a petition of the guardian of a woman for a decree of nullity of a marriage between her and one P., deceased, on the ground that her consent to the marriage was obtained by force and fraud, it was *held*, that she was not a competent witness.

PETITION FOR A DECREE OF NULLITY of a marriage between the said Almira and one George W. Pierce, deceased, celebrated before Rufus A. Earl, a justice of the peace, on the 30th of August, 1866. The petition was based on the ground that the consent of the said Almira to said marriage, was obtained by the fraud of the said Earl and of one Merrick Butler, and others to the petitioner unknown, for the fraudulent purpose of thereby changing her legal settlement from the town of Plymouth to the town of Reading. The allegations of the petition are sufficiently stated in the opinion.

The petitioner introduced testimony tending to show that the said Almira had always been a feeble-minded person, easily influenced, and not capable of taking care of herself, or of making

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contracts ; that on the morning of the alleged marriage, she was decoyed into the house of the said Butler, in Plymouth, who was very officious in the matter of said marriage, and therein forcibly detained against her will, and against the will of her mother and natural guardian. The petitioner then offered to prove by the said Almira, that she was detained at said Butler's as aforesaid, against her will, by threats, fraud, and force, until a justice could be procured, and while the justice was there ; that she never at any time consented to any marriage with the said Pierce, and that no marriage in fact ever took place between them, and that the marriage certificate set forth in the petition, and which was read on the trial, was false in fact, so far as any consent on her part to the alleged marriage was concerned. The petitionee objected to the competency of the said Almira as a witness, and the court, at the May term, 1872, BARRETT, J., presiding, excluded her ; to which the petitioner excepted. There was then testimony introduced tending to contradict some of the above testimony. The court dismissed the petition.

*Gilbert A. Davis*, for the petitioner, maintained that the said Almira was not a party to this suit, and had no interest therein, and was, therefore, a competent witness ; because, although there might have been a marriage in fact, the said Pierce being dead, she was competent to testify to what was within her own knowledge, unless the disclosure would betray matters of confidence between them ; and cited *Smith v. Potter*, 27 Vt. 308.

*J. Converse*, for the petitionee, maintained that the said Almira was not a competent witness, and cited *Wiser et ux. v. Lockwood's Estate*, 42 Vt. 720 ; that, however forcible or fraudulent the marriage might have been, the subsequent cohabitation of the parties rendered it indissoluble for that cause ; and that in no case can such proceedings be sustained after the death of one of the parties, and cited *Pingree, Adm'r, v. Goodrich*, 41 Vt. 47.

The opinion of the court was delivered by

PECK, J. This is a petition of Almira Pierce, by her guardian, to the county court, to annul the marriage between her and George

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W. Pierce, celebrated in 1866, alleging that said George W. Pierce is deceased, and praying that the town of Plymouth be made a party to the suit or proceeding. The petition sets forth that some of the forms of legal marriage ceremony were gone through with between the parties to the marriage, in the presence of Rufus A. Earl, a duly qualified and acting justice of the peace, who has caused a certificate of marriage of the parties to be recorded in the town clerk's office; setting forth the certificate in the petition, which is in due form, evidencing a valid marriage. The alleged ground for annulling the marriage is, "that such pretended marriage was and is not binding in law upon said Almira, for the reason that the nominal consent of said Almira thereto, was obtained by the fraud of the said Earl, of one Merrick Butler, and of divers other persons unknown to the petitioner at present, with a fraudulent purpose of thereby changing the legal settlement of the said Almira from the said town of Plymouth to the said town of Reading;" alleging that at that time George W. Pierce had a legal settlement in Reading, and the said Almira's legal settlement was then in Plymouth, and that since the death of George W. Pierce, Plymouth, in 1870, procured an order of removal of said Almira as a pauper, from Plymouth to Reading, from which order Reading has appealed; that the appeal is pending, and that the determination of it depends on the legal and binding character of that pretended marriage. The case made by the petition is not a case of a marriage null and void without any decree or sentence declaring it so, but is a case under §11, ch. 70, Gen. Stat., and under that part of that section which authorizes the court, by sentence of nullity, to declare void a marriage on the ground that the consent of one of the parties was obtained by fraud. It is the case of a marriage in fact not void, but voidable, and remains good until by some sentence or decree of court it is annulled or declared void. The proof introduced to show the alleged marriage, that is, the marriage certificate of the tenor set out in the petition, showed, *prima facie*, a valid, legal marriage; and it then remained for the petitioner to prove it invalid or voidable for the cause alleged; that is, that the consent of the *feme* petitioner, to the marriage, was obtained by fraud. To establish this, the case

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shows that the petitioner introduced evidence tending to show that Almira ever has been a feeble-minded person, easily influenced, and not capable of taking care of herself, or of making contracts; that on the morning of the alleged marriage, she was decoyed into the house of one Merrick Butler, in Plymouth, who was very officious in the matter of the marriage, and that said Almira was therein forcibly detained against her will, and against the will of her mother and natural guardian. At this point in the trial, the wife of said George (who must be regarded as such till the marriage is annulled) was offered as a witness on the part of the petitioner, to invalidate the marriage by proving, in substance, what the evidence already introduced on that point, as already stated, tended to prove, and also (in the language of the exceptions), "that she never consented to any marriage to the said George W. Pierce at any time, and that no such marriage in fact ever took place, and that the certificate of the justice set forth in said petition, and which was read on the trial, was false in fact, so far as any consent on her part to the alleged marriage" was concerned. It has always been held in this state, that upon petitions for divorce and for annulling marriages, the parties are not competent witnesses: and it makes no difference in this respect, that the husband is dead, if such is the fact, as alleged in the petition. Therefore, unless there is something to distinguish this from ordinary cases of petitions for annulling a marriage for the cause alleged in this petition, the ruling of the court was correct in excluding the female petitioner as a witness. This petition is but a petition of the wife, although prosecuted by her guardian in her behalf. Section 11 of the statute by virtue of which the petition is brought, providing that "a marriage may be annulled on the ground that the consent of one of the parties was obtained by force or fraud, during the life of the parties, or one of them, on the application of the party whose consent was so obtained, or of the parent or guardian of such party, or of some relative interested to contest the validity of the marriage," gives no right to the guardian which the ward would not have if she had no guardian, and the petition were in her own name. Indeed, in strictness, this petition should have been in form in the name of

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said Almira, by Davis, her guardian. The guardian simply represents her rights and interests. The allegation that the intent of those procuring the marriage was to change her settlement from Plymouth to Reading, is of no importance except to show a motive for the alleged fraud in procuring her consent to the marriage. The particular motive is not material; but proof of some motive might be a circumstance as evidence in aid of the proof of the fraud alleged. The petition is not brought in behalf of the town of Reading. The guardian is not, in this proceeding, the guardian of the town, but of Almira Pierce. Whatever collateral interest the town may have in the result, cannot affect the mode of proceeding under this petition, or give any additional right to the petitioner, Almira Pierce, to testify.

Judgment affirmed.

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CHARLES HAWKINS v. MARTIN MCINTYRE.

*Partnership. Assumpsit.*

The defendant took a job of finishing a church at a certain price. Afterwards, the plaintiff and defendant agreed to go on together and do the job, each working himself, and the work of each to offset that of the other, the expense of materials, and of other help, to be deducted from the contract price, and the balance divided equally between them. They went on and did the job accordingly, and the plaintiff worked thereon thirty days more than the defendant.

*Held*, that the parties were not partners as between themselves.

*Held*, also, that assumpsit would lie to recover what the defendant had received on the job more than his share, and that the plaintiff was entitled to have his extra work reckoned, in determining how much he was entitled to receive according to the agreement.

GENERAL ASSUMPSIT. Plea, the general issue, and trial by the court, December term, 1872, BARRETT, J., presiding.

The defendant contracted to finish off a church in Chester, in the season of 1870, for \$4,500. Having thus contracted, the defendant agreed with the plaintiff that they would go on together and do the job, each working himself, the work of each to offset that of the other, and the expense of materials, and other work,



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to be deducted from the price of the job, and the balance divided equally between them. They went on and did the job accordingly, and most of the \$4,500 was paid to the defendant by the other party to the original contract, the remainder having been trusted in this suit. Upon adjusting the matter between the parties, the court found the plaintiff entitled to \$665.30 of the money thus paid to the defendant. The plaintiff objected that assumpsit could not be maintained for the recovery thereof, but that account was the proper remedy. The court, *pro forma*, overruled the objection, and rendered judgment for the plaintiff for the amount aforesaid; to which the defendant excepted. As bearing upon this question, these further facts are stated. The plaintiff and defendant each made up an account of the expense of doing said job, and the defendant's account amounted to \$300 more than the plaintiff's. The court found that the defendant's account embraced items for articles and work of hands used and employed by the defendant on other jobs which he was doing in Chester during the same period on his private account. The plaintiff, in ascertaining what he was entitled to have, charged the defendant with lumber used for stagings, and the like, at the price paid therefor. The defendant claimed that he did not have said lumber, but that it had been divided between him and the plaintiff; and that at any rate, it had been damaged by using, and was worth much less than the price paid therefor. The court found that the defendant had some, but not all, of said lumber, and that what he did have was worth considerably less than the price paid for the same. The plaintiff worked thirty days on said job more than the defendant, and the court allowed the plaintiff therefor in finding the sum due him. Extra work to the amount of \$50.50 was done on said church, above the \$4,500, which the plaintiff claimed should be added to that sum in finding the balance to be divided between them. But the court found that said sum for extra work had not been paid to the defendant, and that the party contracting with him to finish the church denied his liability therefor, and refused to pay it, and the same was excluded in finding what the plaintiff was entitled to as aforesaid. The defendant claimed to be allowed \$22.50 for interest discounted on

the last installment of said \$4,500 for being paid three months before due. The plaintiff claimed that the discount was made without his knowledge or consent, and that there was no reason for making it, and objected to its allowance; but the court adjusted it in their finding aforesaid.

*Geo. L. Fletcher*, for the defendant.

The case shows that the plaintiff and defendant were partners in the transaction. 3 Kent Com. 24; Story Part. 37 *et seq.*; *Brigham v. Dana*, 29 Vt. 1.

Account is the only action that one partner can sustain against his co-partner to adjust their partnership accounts. *Adm'r of Cilley's Est. v. Tenney*, 31 Vt. 401; *Bishop v. Baldwin*, 14 Vt. 145; Chit. Cont. 236; *Collamer v. Foster*, 26 Vt. 754, 757; Collyer Part. § 264; *Estes v. Whipple et al.* 12 Vt. 373; *Casey v. Bush*, 2 Caines, 293; 1 Chit. Pl. 26; 1 Swift Dig. 352; *Hayden v. Merrill*, 44 Vt. 336.

To maintain this action, the plaintiff must show that the joint accounts, involving the labor of hired help, materials used in doing the job, lumber and materials used and taken from the job by each party, lumber and materials purchased for the job and on hand, had been previously settled, and a balance found remaining to be equally divided. *Murry v. Bogert et al.* 14 Johns. 318; *Casey v. Bush*, *supra*; *Westerlo v. Evertson*, 1 Wend. 688; *Wetmore et al. v. Baker et al.* 9 Johns. 307.

*L. Adams and Hugh Henry*, for the plaintiff.

The plaintiff and defendant were not partners as between themselves. *Hilliker v. Loop*, 5 Vt. 116; *Ambler v. Bradley*, 6 Vt. 119; *Bowman et als. v. Bailey*, 10 Vt. 170; *Hall et al. v. Peck*, Ib. 474; *Kellogg v. Griswold*, 12 Vt. 291; *Felton v. Deall*, 22 Vt. 170; *Tobias v. Blin*, 21 Vt. 544; *Stearns v. Haven et als.* 16 Vt. 87; *Mattocks v. Lyman et al.* Ib. 113; *Mason v. Potter*, 26 Vt. 722; *Duryea v. Whitcomb*, 31 Vt. 395; *Bruce v. Hastings*, 41 Vt. 380; *Dewey v. Cabot*, 6 Met. 92; *Holmes v. Railroad*, 5 Gray, 58; *Loomis v. Marshall*, 12 Conn. 69; 4 Esp. 182; *Mowrey v. Whitney*, 10 Johns. 226; *Lowry v. Brooks*, 2 McCord,

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421; *Harding v. Foxcroft*, 6 Greenl. 76; *Cutler v. Miner*, 6 Pick. 335; *Rice v. Austin*, 17 Mass. 206; Collyer Part. 13, 14, and notes.

Assumpsit is the proper remedy in this case, for the terms of the contract are completed, and money has become due. *Way v. Wakefield*, 7 Vt. 223, 228. And assumpsit and account are in a great variety of cases concurrent remedies. *Hall et al. v. Peck*, and *Tobias v. Blin*, *supra*.

In Massachusetts assumpsit may be maintained for balance of account after dissolution, on an implied promise, without the balance being struck. *Fanning v. Chadwick*, 3 Pick. 420; *Bond v. Hayes*, 12 Mass. 34; *Wilby v. Phinney*, 15 Mass. 116.

The opinion of the court was delivered by

WHEELER, J. The parties were not found to be partners by the county court, nor do the facts found and stated show them to have been such as between themselves. The arrangement shown was for performance of labor by the plaintiff for the defendant upon the church, and for ascertaining how much the plaintiff was to have for the labor. The adjustment of items by the court was necessary only for the purpose of arriving at the amount of the compensation, and could properly be done in the action of assumpsit. The agreement seems to have been that the parties were to work against each other day by day, and this would imply that if one worked when the other did not, the one that worked should be allowed for it. The plaintiff having so worked, was entitled to have that work reckoned in determining how much there would be to go to him according to the agreement. No question seems to have been made about other items of allowance.

Judgment affirmed.

## ALLEN J. LAMB v. CHARLES S. MASON.

*Exemption of Homestead from Attachment.*

Under the statutes of this state, the homestead of a debtor is exempt from attachment upon debts contracted after the filing of the deed thereof in the town clerk's office, and before the occupation of the premises by the debtor as a homestead, when he is in such occupancy at the time of the attachment.

The case of *West River Bank v. Gale*, 42 Vt. 27, cited and approved.

**EJECTMENT** for a messuage and premises in the village of Ludlow. The defendant disclaimed as to all the premises in the declaration mentioned, except as to an estate of homestead therein, set out to him on the 12th of August, 1868, on the levy of an execution against him and one Guernsey in favor of Poor & Co., upon a portion of the premises disclaimed, as to which, he pleaded not guilty. Trial by the court, December term, 1872, BARRETT, J., presiding.

The plaintiff attached said messuage and premises on a writ in his favor against the defendant and said Guernsey on the 3d day of December, 1866, and levied an execution thereon, issued on the judgment rendered in said suit on the first day of April, 1869. Said judgment was founded upon four promissory notes executed by the defendant and said Guernsey in the years 1864, and 1865. The defendant was in possession of said homestead at the time of the attachment, and so continued to the time of trial. Evidence was given as to the value of the use of said premises. The defendant gave in evidence a deed of said premises from Clark H. Chapman to himself, dated January 4, 1856, filed for record February 28, 1856; also a deed thereof from the Black River Savings Bank to himself, dated the 5th day of said January, and filed for record on said 28th day of February. At the time said deeds were given, there was a small dwelling-house standing upon said premises.

The defendant gave evidence tending to show that at the time he took said deeds, he intended to build a store on said premises, with a dwelling in the upper part thereof, to be used by himself and family as a homestead, and kept the same for that purpose;

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that in the year 1861, he erected a two story building thereon, and finished off the lower part for a store, and occupied it for a store, and so continued to occupy it until the summer of 1866; that the house which was on the premises at the time of purchase, was made an ell, or back part, to the new building, and the building was finished on the outside that year; that in 1866, and between the 24th day of May and about the first day of November, he finished off the upper part of said building for a dwelling-house for himself and family; that at the time he took said deeds, he owned and occupied a dwelling-house in said village, and continued to own and occupy the same until May 24, 1866, when he sold and conveyed it for \$1850, and moved into a house with his sister, and resided there till the first days of November, 1866, when he moved into the dwelling which he had finished off in said building, and resided therein with his family ever after, using and occupying the same as his homestead, and was so using and occupying the same at the time of the attachment and levy aforesaid; that when he moved in May, as aforesaid, he put a part of his household goods into said building, and when he built said store building in 1861, he planned to have a dwelling-house in the upper part thereof, and purchased doors therefor that year, and kept them until he finished off the dwelling part in 1866, when he used them; that the expense of finishing off said dwelling was from twelve to fourteen hundred dollars; that there was a mortgage on the dwelling-house which he sold in 1866, of three hundred dollars, which he paid on the same day he conveyed it, and before receiving the purchase money therefor.

The homestead set out as aforesaid did not include all of the dwelling part finished off in said building. The defendant claimed that the premises so set out to him as a homestead were exempt from attachment, and gave evidence tending to show that he worked finishing off said dwelling the greater part of the time through the summer and fall of 1866, and that his minor son worked some of the time, and that he had a horse he worked some, and that the work so performed was worth fifty dollars per month. The court found from the evidence that the defendant did not reserve as a separate fund to finish off the upper part of

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said building into a dwelling-house, the money received on the sale of his former homestead ; nor that any part of that specific money was paid out for that purpose ; but did find that he used that money indiscriminately about his current business, and that the payments he made towards the finishing off of the upper part thereof, were made out of the funds he happened to have on hand, without any regard to the source from which they came.

The court rendered judgment for the plaintiff for the seisin and possession of that part of said premises claimed as a homestead, and for the amount of the rental value thereof. Exceptions by the defendant.

*Walker & Goddard*, for the defendant, cited *West River Bank v. Gale*, 42 Vt. 27 ; *Morgan v. Stearns et al.* 41 Vt. 398.

*J. J. Wilson* and *A. P. Hunton*, for the plaintiff.

The opinion of the court was delivered by

WHEELER, J. In *West River Bank v. Gale*, 42 Vt. 27, it was held that under the statutes of this state the homestead of a debtor was exempt from attachment upon debts contracted after the filing of the deed of the homestead for record in the town clerk's office, and before the occupation of the premises by the debtor as a homestead. There have been several sessions of the legislature since that decision was made and published, and no change has been made in the statutes that received that construction, and it must be regarded as settled. There is nothing in this case to distinguish it from that in principle, and accordingly it must be held that no title to the premises set out to the defendant as a homestead was acquired by the levy.

Judgment reversed, and judgment for the defendant.

## J. N. MOORE ET ALS. v. THE TOWN OF CHESTER.

*Mandamus. Highway. Gen. Stat. ch. 24, §44.*

When the selectmen of a town, on application for that purpose, refuse to lay out a highway therein, any three or more freeholders of the town or vicinity, although not the same persons who signed the petition to the selectmen, may make application to the county court for that purpose, under §44, ch. 24, of the Gen. Stat.

Such application, when brought within a reasonable time, is in season, although not brought to the next term of the court, and more than twelve days intervene between the refusal of the selectmen and the next term.

Petitioning for a highway to be laid to the line of a town, there to connect with a proposed highway to be laid through an adjoining town, thence into an adjoining county, is not petitioning for a highway to be laid out of the former town.

**PETITION FOR MANDAMUS.** The petitioners preferred their petition to the May term, 1872, of the county court, setting forth that Martin R. Lawrence and others, in October, 1871, made application to the selectmen of the town of Chester to lay out and survey a public highway in said town, to connect at the line of said town with a proposed highway to be laid out by the town of Springfield, which last named highway was to connect with a highway to be laid out by the town of Rockingham, in Windham county, and that said selectmen, on the 28th day of said October, refused to lay out said highway, and praying that said court lay out and establish said highway, and for the appointment of commissioners. The defendant filed a motion to dismiss said last named petition, because the same was not brought to the term of said court next succeeding the refusal of said selectmen to lay out said highway,—alleging that more than thirty days intervened between the time of said refusal and the then next term of said court, and that a term of said court intervened between said refusal and the bringing of said petition,—and because said proposed highway extended into the two counties of Windsor and Windham, wherefore said court had no jurisdiction of the subject-matter of said petition. Said court, at the May term, 1872, BARRETT, J., presiding, *pro forma*, sustained said motion, and dismissed said petition, wholly upon legal grounds, finding as matter of fact, that the same was brought within a reasonable time

after the refusal to lay said highway, and holding, so far as vested in the discretion of the court, that the same was seasonably brought. The petition to this court, as originally drawn, prayed for a writ of *certiorari*; and as amended, for a writ of *mandamus* also.

*C. B. Eddy* and *W. C. French*, for the petitioners.

The county court having, *pro forma*, dismissed the petition, the only way to get the legal questions in the case before this court previous to the act approved November 21, 1872, was by *certiorari*. *Adams v. Newfane*, 8 Vt. 271; *Paine v. Leicester*, 22 Vt. 44; *Lyman v. Burlington*, Ib. 181.

This petition is based on §44, ch. 24, of the Gen. Stat., which does not limit the time when the petition to the county court shall be brought.

The second objection cannot prevail, as the highway asked for would be wholly in the town of Chester. The petition to the selectmen was clearly within the purview of §1, ch. 24, of the Gen. Stat.

*L. Adams* and *H. H. Henry*, for the defendant.

If the petition to the county court could in any event have been brought to that court, it could only have been brought to the next term thereof after the refusal of the selectmen to lay the road. Such was the evident intention of the legislature, as §44, of ch. 24, of the Gen. Stat., under which these proceedings are had, refers to the three preceding sections, which specifically designate the "next term" of the county court. Moreover, the legislature indicates its intention fully in this section itself, when it uses the words, "at least twelve days before said court."

The road prayed for, connecting with and being a portion of a proposed highway extending into another county, not opened for travel, comes clearly within the language of §64, and the petition should have been originally brought to the supreme court.

The opinion of the court was delivered by

WHEELER, J. It is claimed that §44, of ch. 24, of the Gen. Stat., under which the proceeding in question was brought, refers



to §§41, 42, and 43, of that chapter, so that proceedings like this under §44, must be commenced as promptly as is required by §41. But the words, "as before provided in this chapter," in §44, refer to the sections which provide for application to the selectmen, and not to §41. The proceeding provided for in §41, is like an appeal from the decision of the selectmen laying the highway, and stays all proceedings until it is disposed of. *Taft v. Pittsford*, 28 Vt. 286. In that proceeding, the landowner is the appealing party, and he can decide at once whether he desires to appeal or not, and there was good reason for requiring him to proceed at once. The proceeding under §44 is different. It is necessary that application be made to the selectmen before it can be made to the county court, but it need not be made by the same persons. Application to the selectmen must be made by freeholders of the town. Section 19 of same chapter. But if the selectmen refuse or neglect to lay out, alter, or discontinue the road, application may be made to the county court by any three or more freeholders of the town or vicinity. The application to the selectmen is necessary to give the county court jurisdiction; but the application to the county court is not so much in the nature of an appeal, as the one under §41 is, nor as this would be, if it could be had only by the persons who had applied to the selectmen. The neglect or refusal of the selectmen might not be known as promptly to those who might wish to apply to the county court upon their failure to act, as their action would be to a landowner over whose land they had laid a road; and when known to them, more time might be necessary for them to make their application in, than would be required for him to make his in. These are good reasons for requiring more prompt action in the appeal by the landowner, than in the proceeding under §44, and the proceedings are so different from each other that a fair construction of the statutes will not carry the provision as to when the application must be made along from §41 to §44. The county court found that the proceeding was commenced within a reasonable time after the refusal of the selectmen, and that makes it unnecessary to decide now as to what might be the effect of delay beyond a reasonable time. The only decision made upon this point is, that when brought within

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a reasonable time it is in season, although not brought to the next term of the court, and more than twelve days intervene between the refusal of the selectmen and the next term.

The petition did not ask for a highway to be laid out of the county of Windsor, nor the town of Chester, and was well enough in that respect.

The prayer of the petition to this court, as it stood originally, was not exactly proper, because it is asked that a writ of *certiorari* might issue, which is adapted to quashing the whole or some distinct part of erroneous or irregular proceedings, but not to requiring further proceedings. But a motion to amend in this respect having been made and granted, a writ of *mandamus* in the nature of a *procedendo*, directing the county court to entertain and proceed with the petition, is awarded.

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ROLAND P. POLLARD v. JOB BATES.

*Evidence.*

In trover for a yoke of oxen, the plaintiff claimed title as conditional vendor thereof to one H., who sold them to the defendant. The defendant claimed that said sale to H. was absolute. After his sale to the defendant, H. failed, owing the plaintiff a small sum besides the debt for said oxen. Many of the creditors of H. brought suit and attached his property, which the plaintiff knew, but he did not commence suit. *Held*, that, as tending to show the plaintiff then supposed he had a lien on said oxen for the payment of the price at which he sold them to H., and that his conduct then was consistent with his claim on trial, it was competent for him to testify that he forbore to sue, because he had such lien, and had rather run the risk of losing his other claim than to be at the trouble and expense of a suit.

The defendant introduced a composition deed, which never became operative, signed by the plaintiff, and other creditors of said H., after the sale of said oxen to the defendant as aforesaid, and claimed that it tended to show that the plaintiff had no lien on said oxen, else he would not have signed it. *Held*, that, to rebut such inference, the plaintiff might show that at the time he signed said deed, he said he had a claim on said oxen for \$225—the price he sold them at—that he looked to the defendant for the oxen—and that it was understood that said deed did not include his claim for them.

TROVER for a pair of oxen. Plea, the general issue, and trial by jury, December term, 1872, BARRETT, J.. presiding.

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The plaintiff testified, in substance, that in the year 1867, he sold a pair of young oxen, or steers, to one Ethan A. Hall, towards which he had received, in deal between them, some portion of the pay, but there was still an unpaid balance when, in the fall of 1868, said Hall applied to him for another pair of oxen, saying that he could not pay down for them, but wanted a credit, but that the oxen should remain the property of the plaintiff until they were paid for; that the plaintiff informed him he had not at that time such oxen, but was soon going to Plymouth, and thought he could get him a pair, and if he could, he would, and if they could agree about the price, he would let said Hall have them on the condition named; that in a few days the plaintiff went to Plymouth, and purchased a pair of oxen and drove them to said Hall's place, when the same were examined by said Hall, and the price agreed upon at \$225; that there was at this time something said about Hall's giving a note for them, but the plaintiff said it was towards night, and he was tired and hungry and wished to go directly home, some two miles distant, at North Chester, and he would make a note such as he was accustomed to take in such cases, containing the agreement for the lien, and when Hall came that way, he might sign it; that no note or other writing was ever given; that in the spring of 1869, Hall sold and delivered said oxen to the defendant; that the next June the defendant asked the plaintiff if he had a lien on the oxen, saying he had heard he had, and the plaintiff informed him he had—that they were his until paid for—that if Hall paid him for the same, well and good, otherwise, he should look to the defendant for the oxen, or the pay therefor; that the next July, the defendant inquired of the plaintiff if Hall had paid him for the oxen, and the plaintiff informed him that he had not, and a conversation similar to the foregoing was repeated between them. There was no proof as to the trade between Hall and the defendant, or that the defendant had paid Hall any thing towards the oxen. The defendant sold the oxen in March, 1870, and they were driven to market. The plaintiff also testified to the value of the oxen. The defendant was not in court, nor did he testify in the case.

Hall testified that he never made any contract with the plaintiff that the oxen should be his until paid for; but made an absolute and unconditional purchase of the oxen, and was to pay for them just when he pleased, even at the end of twenty years; that the only contract pertaining to the oxen, was when the plaintiff delivered them to Hall. The defendant introduced three witnesses who testified that they were present at the delivery, and

there was nothing said about the plaintiff's having any lien upon the oxen for his pay.

Hali failed in February, 1870, and proved to be unable to pay his debts. Many suits were commenced, and attachments made of his property, which was known to the plaintiff. The plaintiff's counsel inquired of the plaintiff why he did not bring a suit and attach property with other creditors, which question was objected to by the defendant's counsel, but was admitted by the court: to which the defendant excepted. The plaintiff replied that Hall was owing him only for the balance due him for the first pair of oxen, or steers, except what was secured by his lien on the oxen in the hands of the defendant, and he and Hall had never settled, and he preferred to run his chance in getting his pay, to bringing a suit for it. Hall appeared on the trial, acting in the manner of the real defendant, and it was claimed by the plaintiff that he was the real defendant, which was not denied by the other side.

The defendant introduced a composition deed, with the signature of the plaintiff, one of the creditors, with others, thereon, which deed was never acted upon, on account of some misunderstanding among the parties with reference to it, and claimed that it had a tendency to show that the plaintiff had no lien on these oxen, or he would not have signed it. Said Hall testified that, aside from the oxen in question, there was a balance of about \$20 due him from the plaintiff on their other matters of trade and deal. The plaintiff, in rebutting, then offered to show by one Spaulding, the trustee under the deed, who was instrumental in getting signatures of creditors thereto, that when the plaintiff signed the instrument, he said he had a lien on a pair of oxen for \$225, and that Hall owed him only the balance that was due him—that he looked to Bates for the oxen—that his claim against Hall did not include the oxen. This the defendant objected to, but the court overruled the objection, and admitted the testimony; to which the defendant excepted. The only question of fact made to the jury, was whether the plaintiff did retain a lien on the oxen as he swore he did. There were no exceptions to the charge of the court.

*Geo. L. Fletcher and Norman Paul, for the defendant.*

The court below erred in admitting the testimony of Spaulding to declarations of Pollard. There is no rule of law that will admit such testimony. *Worden v. Powers*, 37 Vt. 619; 1 Greenl. Ev. §108, and note. It was the sayings of the party to

contradict and vary the terms of the composition deed, an instrument in writing, under seal.

It was not admissible as a part of the *res gestæ*. It in no way has relation to any act or declaration of Pollard at the time of the contract of sale of the oxen to Hall ; neither was it in the presence of the defendant, or of Hall, or of the witness. It is inadmissible, because it is the sayings of the party out of court, and cannot be given in his own favor, and is not contemporaneous with the main fact or transaction in issue. It is a well established rule of law, that sayings of a witness out of court, are not admissible to corroborate his testimony, but are admissible to impeach him. If a declaration has its force by itself, as an abstract statement depending for its effect on the person making it, it is not admissible—it is only hearsay. *Worden v. Powers*, 37 Vt. 619 ; *State v. Davidson*, 30 Vt. 377 ; 1 Greenl. Ev. §108, and notes on pp. 148, 149, 150, 151 ; *Munson v. Hastings*, 12 Vt. 346 ; 2 Phill. Ev. 767 ; *Ellis v. Howard et als.* 17 Vt. 330 ; *Ogden v. Peters et al.* 15 Barb. 560 ; *Ellicott v. Pearl*, 10 Peters, 412 ; *Conrad v. Griffey*, 11 Howard, 480 ; *Queen v. Hepburn*, 2 Peters C. Rep. 496 ; *Robe et al. v. Hockley*, 12 Wend. 49 ; *Elkins v. Hamilton*, 20 Vt. 627 ; *Upham & Clay v. Wheelock*, 36 Vt. 27 ; *Haines & Kellogg v. Soule*, 14 Vt. 99 ; *Carpenter v. Hollister et al.* 13 Vt. 552.

It was error to admit the testimony of the plaintiff as to his reasons for not commencing suit against Hall. It is a narration of the witness's own private thoughts, never expressed in the hearing of any one. Yet such testimony was given to the jury, to obtain a verdict. If a party's own declarations are excluded, much more should a party's thoughts and unexpressed reasons be excluded.

There was no objection to the composition deed, and it was the duty of the court to give the jury its legal construction. Parol evidence was not admissible to explain, add to, or vary, its meaning. There is no ambiguity in it. If it was not admissible, on objection it should have been rejected ; but, when admitted, the defendant had a right to a legal construction of it by the court, and its effect as evidence before the jury. It was not subject to

the testimony given by Spaulding, or Pollard, to show its terms, nor to what Pollard's reasons were for signing, nor what amount he intended should be included of his and Hall's dealings.

*J. Converse and W. E. Johnson*, for the plaintiff.

To sustain the testimony of Hall, a composition deed was introduced by him, upon which the plaintiff's name appeared. "*The defendant claimed that this had a tendency to show that the plaintiff had no lien on those oxen, or he would not have signed the deed.*" If such was the character of that paper, was it not proper for the plaintiff to rebut that presumption? If so, could there be any thing more legitimate, direct, and proper, than the declarations of the plaintiff at the time he signed the paper? Can there be any objection to proving those declarations by a disinterested third person, and especially by one who was to carry into effect the paper as a trustee, and who would be likely to notice carefully and remember correctly what the plaintiff said at the time?

Objection was made to the question propounded to the plaintiff, why he did not bring suit and secure his debt with other creditors, by attachment. The attachments of many creditors, and that known to the plaintiff, and his neglect to sue, might be used as an argument in favor of Hall's testimony, that the purchase was an absolute one, to be paid for "*just when he pleased, even at the end of twenty years.*" Can there be a doubt that such presumption may be rebutted by proper testimony? If so, then clearly, the plaintiff was a competent witness for that purpose. No matter how, or by what means, the above facts got into the case; testimony showing the conduct of the plaintiff, and the object and motive of such conduct with reference thereto, is proper. If the facts could not operate to the prejudice of the defendant, neither could the explanation, nor could both together.

The opinion of the court was delivered by

Ross, J. The question in controversy was, whether the plaintiff retained a lien on a certain pair of oxen when he sold them to Ethan A. Hall, which oxen Hall had sold to the defendant, and

for the conversion of which by the defendant the plaintiff brought this suit. The plaintiff claimed and testified that, by the agreement between him and Hall at the time he sold Hall the oxen, the oxen were to remain his property till Hall paid him for them. Hall claimed and testified that his purchase of the oxen was absolute and unconditional, and that he was to have twenty years to pay for them if he desired. We think on this issue, it was permissible to allow the plaintiff to show that his acts had been consistent with what he claimed the trade was. When, therefore, it turned out in evidence that Hall had failed, and others had brought suits against him, and that these facts were known to the plaintiff, he could properly be allowed to testify that he did not bring a suit against him, for the reason that he held a claim on the oxen for the payment of the price at which he sold them to Hall, and, besides the debt for the oxen, Hall owed him but a small sum, which he rather run the risk of losing than be at the trouble and expense of a suit. His neglect to sue, having knowledge of the failure of Hall, and of suits brought by Hall's other creditors, was an act of the plaintiff, which tended to show he then understood he had a claim on the oxen to secure the payment of the price at which he sold them, and, as such, the plaintiff had a right to have the jury know that he knew of the suits by Hall's other creditors, but did not sue himself, for the reason he had a lien upon the oxen.

The defendant introduced a composition deed, signed by the plaintiff, with other creditors of Hall. Although the deed never became operative, the fact that the plaintiff signed it, unexplained, would have a tendency to show that the plaintiff did not retain a lien on the oxen for their payment. We think, to rebut the tendency of this act, the plaintiff might show by himself and Spaulding, the trustee in the composition deed, that he did not sign the deed with reference to the debt due him for these oxen, but with reference to the small amount due him from Hall aside from these oxen, and that it was understood between him and Spaulding that the debt for these oxen, and his lien on them, should not be included within the operation of the composition deed. The deed was not in issue between the parties, but the plaintiff's signature

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to it was shown as an act inconsistent with the claim the plaintiff was then making. The plaintiff and Spaulding were allowed to testify as to what debt due the plaintiff it was understood between them at the time the plaintiff signed that the deed was to be operative upon; not to add to, take from, contradict, or vary the language of the deed, but to explain the plaintiff's act of signing the deed, which was relied upon by the defendant as inconsistent with the claim the plaintiff was attempting to assert by the suit. As explanatory of the plaintiff's act, the question is not what is the legal effect of the language used in the deed, but what rights belonging to him did the plaintiff understand were to be affected by his signature of the deed, at the time he signed it. To show what rights he supposed he was signing away, he had a right himself to testify, and to call Spaulding to testify, as to what was said between them in regard to the effect of the deed upon his rights at the time he placed his signature to the deed.

Judgment affirmed.

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JOHN M. SHAW v. FRANCIS CHAMBEELIN.

[IN CHANCERY.]

*Demurrer to Bill for want of Equity. Parties. Plea in Bar. Practice.*

The bill in this case alleged that while W. was the owner of a certain farm, the orator purchased and took a deed of him of about one acre thereof, with a dwelling-house and other buildings thereon, and went into the possession and enjoyment thereof; that the same had for a long time been, then were, and ever thereafter continued to be, supplied with water by means of an aqueduct laid thereto from a spring situate on another part of said farm; that at the time of such purchase, it was mutually agreed between W. and the orator, that the orator had purchased the right to draw water from said spring as aforesaid, but that they omitted to specify said right in the orator's deed, because they supposed it would be conveyed thereby without being so specified; that W. continued to own the residue of said farm for several years thereafter, and never made any claim to said aqueduct; that said aqueduct was visible and apparent, and the defendant, and those under whom he claimed, subsequent to W., had full notice of the existence thereof at the time of their several purchases of



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the residue of said farm; and prayed for an injunction against interfering with said spring and aqueduct to the injury of the orator, and for general relief. *Held*, that said bill was not defective for want of equity.

*Held*, also, that W., who subsequently parted with all his interest in the residue of said farm, was not a necessary party to said bill, as the bill disclosed one ground on which the orator would be entitled to relief without addition of parties.

After W. conveyed to the orator as aforesaid, and while he owned the residue of said farm, he mortgaged the same to O., who subsequently foreclosed his mortgage, by petition, in the mode prescribed by statute, and made the orator a party defendant to the proceedings. The premises were not redeemed. *Held*, that the decree of foreclosure did not bar the orator's right to said spring and aqueduct.

On hearing on bill, demurrer thereto, and plea, the court overruled the demurrer and plea, and entered a decree for the orator according to the prayer of the bill; from which decree the defendant appealed. *Held*, that the defendant was not, therefore, strictly entitled to claim that the chancellor erred in making a final, instead of an interlocutory decree.

## APPEAL from the court of chancery :

The bill alleged that in the year 1838, one Jay Wilson owned a farm in Bethel, known as the Burke farm, on which there was then a brick dwelling-house and other building; that during that year, he built a new dwelling-house, and other buildings appurtenant, on the northern extremity of said farm, and caused an aqueduct to be constructed from a certain spring situate on said farm to said last named dwelling house, for the purpose of supplying the same with water; that thence, for the space of about thirty years, water flowed from said spring, through said aqueduct, to said last named dwelling-house, without molestation or hindrance; that the said Wilson, on the 30th of March, 1849, being the owner and occupant of said farm, mortgaged the same to one Chester Baxter, to secure the payment of the said Wilson's promissory notes to the said Baxter for the sum of \$3,400; that said notes were not paid according to the tenor thereof, whereupon the said Baxter brought his petition to foreclose said mortgage, and obtained a decree of foreclosure against the said Wilson; that before the expiration of the time of redemption therein fixed, the said Wilson agreed with the said Baxter for an extension of said time; that after the expiration of said time, the said Wilson, from time to time, paid different sums of money to the said Baxter, who received and applied the same upon said mortgage; that afterwards, to wit, on the 28th of October, 1851, while the said Wilson was the equitable owner of said farm as aforesaid, and was in possession thereof, and the said Baxter was the legal owner thereof as aforesaid, the said Baxter, in pursuance of an agreement to that effect with the said Wilson, released and conveyed to the said Wilson said new dwelling-house, and about one acre of land thereto adjoining, and the said Wilson, in con-

sideration thereof, thereupon paid to the said Baxter a certain sum of money, which the said Baxter applied upon said mortgage; that afterwards, to wit, on the 29th of November, 1852, the said Wilson mortgaged said new dwelling-house and the land thereto belonging, to one David Owen, to secure the payment of the said Wilson's promissory note to the said Owen for the sum of \$250; that on the 11th of February, 1853, while the said Wilson was the legal owner of said new dwelling-house, subject to said mortgage thereon, and the equitable owner of the residue of said farm, and said Baxter the legal owner thereof, the orator purchased said last named dwelling-house, and the land thereto belonging, of said Wilson, and took a deed thereof, subject to the said mortgage thereon, and paid therefor about the sum of \$400, and then went into the possession thereof, and has ever since remained in possession; that thereafterwards, to wit, on the 17th of December, 1853, the said Wilson paid the balance of said mortgage to the said Baxter, and the said Baxter discharged the same.

The bill further alleged that at the time the said Baxter conveyed said new dwelling-house and land to the said Wilson as aforesaid, water was running thereto from said spring, through said aqueduct, and continued to so run, and was so running at the time the orator purchased as aforesaid; that at that time, it was mutually agreed and understood between the orator and the said Wilson, that the orator had purchased the right to draw water from said spring, through said aqueduct, to the house so purchased by him, but that the orator and the said Wilson omitted to specify said right in the orator's deed, because they supposed the same would be thereby conveyed without specifically naming the same therein; that the said Wilson continued to own and occupy the residue of said farm for several years after the conveyance to the orator as aforesaid, during all which time, water continued to flow through said aqueduct as aforesaid, and the said Wilson never made any claim thereto; that afterwards, the title and interest of the said Wilson in said farm, came to, and rested in the said Owen by virtue of a decree of foreclosure founded upon a mortgage of the residue of said farm, executed by the said Wilson to the said Owen, December 17, 1853; that the said Owen afterwards, to wit, on the 13th of March, 1861, conveyed said farm to one Cummings, who thereafterwards, to wit, on the 27th of February, 1867, conveyed the same to the defendant, who hath ever since owned and occupied the same; that said aqueduct, at the time of the respective purchases by the said Owen, Cummings, and the defendant, as aforesaid, was visible

and apparent, and that each of said purchasers was aware of the existence thereof at the time of their respective purchases; that in January, 1868, and while water was running through said aqueduct as aforesaid, the defendant claimed and insisted to the orator that the orator had no right to said aqueduct, or to said spring of water, but that he himself was the owner of said spring, and had a right to stop the water from flowing in said aqueduct, and threatened so to do, unless the orator paid him rent therefor, and that the defendant procured a lease of said spring to be drawn from himself to the orator, for the orator to accept, but that the orator declined to accept the same, insisting that he was drawing water as aforesaid in his own right; that the orator was, on the 18th day of said January, informed by the agents and servants of the defendant that, unless the orator accepted said lease, they should destroy said aqueduct, and fill up said spring.

The bill averred that there was no water that the orator could obtain for the use of his family and cattle, without going off his land, and conveying the same to his house at great expense; that the destruction of said aqueduct, or the filling up of said spring, would cause the orator great and irreparable damage, for which he had no adequate remedy at law; that the right to draw water from said spring as aforesaid, was worth more than one hundred dollars; and that the orator had reason to believe, and did believe, that the defendant would destroy said aqueduct, and fill up said spring. The bill prayed for an injunction, and for general relief.

The defendant, by leave of court, demurred to the bill for want of equity, and because, if the orator was entitled to relief, the said Jay Wilson was not made a party. The defendant also pleaded the decree of foreclosure obtained by the said Owen as stated in the bill, in bar of this suit, and averred that the orator was a party defendant thereto, duly served with process. The mortgage upon which said decree was founded, was in the usual form. The foreclosure was by petition under the statute, and the petition alleged that the orator claimed some interest in the premises. The petition was taken as confessed, and the decree was in the form prescribed by statute.

The court, at the May term, 1872, BARRETT, Chancellor, upon hearing on bill, plea, and demurrer, overruled the plea and demurrer, and rendered a decree for the orator according to the prayer of the bill. Appeal by the defendant.

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*J. J. Wilson*, for the orator.

A conveyance of a house and lot, supplied with water by an aqueduct running through the land granted, from a spring belonging to, and situate on other land of the grantor, conveys the water as then running, with a right to the spring and aqueduct sufficient for the continuance thereof. *Vt. Central Railroad Co. v. Estate of Hills*, 23 *Vt.* 681; *Harwood v. Benton et al.* 32 *Vt.* 724; *Coolidge v. Hager*, 43 *Vt.* 9; *Pyer v. Carter*, 40 *Eng. L. & Eq.* 412; 4 *Kent Com.* 467; *Nicholas v. Chamberlain*, *Cro. Jac.* 121; 2 *Washb. Real Prop.* 32, 36, 38. The form of the deed from Wilson to the orator does not appear; but even a quitclaim deed carries with it all the right and title which the grantor has. *Smith, Adm'r, v. Pollard*, 19 *Vt.* 272; *Collamer v. Langdon et al.* 29 *Vt.* 32. It stands admitted that Jay Wilson intended to convey said spring and aqueduct, and that the aqueduct was visible and apparent, and that the defendant, and his grantors, Cummings and Owen, bought with full knowledge thereof.

The demurrer and plea were properly overruled. Jay Wilson is not a necessary party. *Dana v. Nelson et al.* 1 *Aik.* 252; 1 *Dan. Ch. Pr.* 183, 192, notes. But this objection must be apparent on the face of the bill, or a demurrer will not lie. *Ib.* 289, 565, 611, 612, 613; 2 *Swift Dig.* 240. It does not appear from the bill that Jay Wilson has any interest in the matter; nor whether the mortgage given by him to Owen, contained any covenant; nor does it appear but that there was an exception of the spring and aqueduct therein. A demurrer does not extend to inferences of law. 1 *Dan. Ch. Pr.* 566-7.

But Wilson would not be a necessary party if his mortgage contained the usual covenants. *Howard v. Benton et al. supra.* Owen acquired no right to the spring and aqueduct by his mortgage on the farm.

The orator being compelled to resort to chancery for one purpose, the court will retain the case until finally disposed of. *Dana v. Nelson et al. supra*; *Beardsly v. Knight et al.* 10 *Vt.* 185; *Sanborn v. Kittredge et al.* 20 *Vt.* 632; *Lyon v. McLaugh-*

*lin*, 82 Vt. 423; *Holmes v. Holmes, Ad'mr*, 86 Vt. 525; *Twitchell v. Bridge*, 42 Vt. 68; 2 Johns. Ch. 162; 2 Swift Dig. 156-7; 1 Dan. Ch. Pr. 581, note; 3 Ib. 1741.

The plea of a former decree must set up enough of such decree, and of the bill and answer, to show that the same point was in issue in the former suit. 2 Swift Dig. 260; 1 Dan. Ch. Pr. 684. But the decree pleaded was only a decree of foreclosure, and barred only the equity of redemption, and the point now in controversy was not raised in that case.

*Hunton & Gilman*, for the defendant.

The defendant, by his demurror and by his plea, prayed judgment whether he should be compelled to answer further; the court, therefore, erred in passing a final decree. Mitf. Eq. Pl. [16]; Adams Eq. [336], [342]; Story Eq. Pl. 784, § 866.

The case of the orator as stated in his bill, does not entitle him to the relief prayed. The bill does not disclose the ground of the orator's claim. The allegations thereof are not sufficient to found a claim upon that a right to take water from the spring was conveyed to the orator, even as an appurtenance.

If it should be claimed that a right to the water passed to the orator as necessary to the enjoyment of the premises granted, we answer; 1st, that the bill does not put the case upon that ground; and 2d, that it is not in fact a necessity. It is not like the case of a way of necessity. Wheat. Selwyn, 1866, pl. 5, and note B. It must be from strict necessity. Ib. note 2.

A deed of a house and land, omitting to name the appurtenances, will not carry a right to take water from a spring on other lands of the grantor. In the cases in which it has been held that by a deed of a house and land the right to such spring would pass, the appurtenances were named in the deed. *Nichols v. Chamberlain*, Cro. Jac. 121; *Coolidge v. Hager*, 43 Vt. 9. The word appurtenances in a deed has force. *Smith et al. v. Martin*, 3 Saund. 400, and n. (2); *Buck et al. v. Newton*, 1 B. & P. 53; *Doe d. Clements, v. Collins*, 2 T. R. 498; *Swazey v. Brooks*, 34 Vt. 451.

If the orator had alleged that a right to the spring, or to the water thereof, passed by the conveyance of the house and land as an appurtenant thereto, it would not entitle him to relief, it not being alleged that the appurtenances were named in the deed. A way of necessity lies in grant. 2 Bl. Com. 35, n. (28); 1 Saund. 323, n. 6.

The allegations of the bill are too vague, indefinite, and uncertain, to warrant any decree thereon. Story Eq. Pl. §§ 242, 244, 255; Mitf. Eq. Pl. 41, 107.

If the allegations of the bill are sufficient to entitle the orator to have the deed reformed under the general prayer, Jay Wilson should be made a party defendant.

The plea is sufficient, and is a bar to this suit.

The opinion of the court was delivered by

Ross, J. The defendant has demurred to the orator's bill, and insists that the same is insufficient by reason of lack of substance and lack of parties. The orator, we think, not in the most approved form, nor with the greatest clearness and explicitness, but in substance, has set forth that he claims the right to have the water from the spring named, situated on the remainder of the Burke farm, so called, flow through the aqueduct to the house which he purchased of Jay Wilson, by virtue of the conveyance of such a right to him in the deed of the premises; or, at least, that he purchased and paid for such a right at the time he purchased and paid for the house and acre of land, and went immediately into the possession and enjoyment of the same, and had so continued to the time of bringing the bill; so that the subsequent purchasers of the remainder of the Burke farm, on which the spring and part of the aqueduct were located, were put upon inquiry that he claimed some right to the spring and aqueduct, and were thereby charged with all the knowledge which the inquiry, if made, would have put them in possession of, as to the rights which he claimed in and to the spring and aqueduct. We think any one so disposed, upon a careful reading of the bill, would fairly understand that the orator claimed a right in and to the spring and aqueduct in both of the ways named; so that the

bill contains sufficient substance to entitle the orator to the relief prayed for.

Every person, who, from the facts stated in the bill, is necessarily interested in the result of the suit, or who has rights in the subject-matter to be protected, is a necessary party to the bill. If the deed from Jay Wilson to the orator, conveyed to the orator the right to take the water from the spring, through the aqueduct, to the dwelling-house conveyed by the deed, Jay Wilson has, and can have, no interest in this controversy, inasmuch as he then owned the remainder of the Burke farm, so that he had the right to make the conveyance, and has since parted with all his interest in the same. On general demurrer, the bill is sufficient in regard to parties, if the facts stated disclose one ground on which the orator is entitled to relief without additional parties. No claim is made that any additional party to the bill is required, unless Jay Wilson is such.

To the ground for relief first above stated, as we have seen, Jay Wilson is not a necessary party. Hence we think the orator's bill is sufficient as against the defendant's general demurrer.

The defendant further insists that the foreclosure of the mortgage on the remainder of the Burke farm, given by Jay Wilson to Daniel Owen, and to which the orator was made a party, is a bar to any right which the orator might have had to the spring and aqueduct. The foreclosure of this mortgage is admitted in the manner stated in the defendant's plea in bar, by the orator's demurrer thereto. At the time that mortgage was given, the orator had obtained whatever right he had to the spring and aqueduct, and was in the possession and enjoyment of the same. Wilson could and did by that deed, convey to Owen only what right he then had in the remainder of the Burke farm, and that was all Owen could acquire by the foreclosure of the mortgage. The foreclosure of the mortgage terminated the equity of redemption which Owen had in the mortgage premises at the time he executed the mortgage. By making the orator a party to the foreclosure of the mortgage, Owen obtained whatever right the orator might have acquired in Wilson's equity of redemption in the mortgaged premises subsequently to the exe-

cution of the mortgage, and nothing more. The foreclosure would not cut off any right or easement in the mortgaged premises, which the orator had acquired antecedently to the giving of the mortgage. Such antecedently acquired rights would be paramount to the mortgage, and remain unaffected by its foreclosure. Hence the plea in bar would not defeat the orator's right to relief under the bill.

The defendant further insists that the court was in error in granting a final decree on the state of the pleadings. If the defendant had elected to have treated the decree of the chancellor as interlocutory, and had asked the chancellor for leave to withdraw his demurrer, and to be allowed to answer the bill on its merits, and the chancellor had denied him that right, the question now attempted to be raised by the defendant, would have been properly before this court. The defendant has elected to treat the decree as final, and has brought the case here on an appeal. We think, as the case stands, the defendant is not strictly entitled to claim that the chancellor was in error in granting a final, instead of an interlocutory decree.

The decree of the chancellor is affirmed, and the cause remanded, with leave to the defendant to apply to the chancellor to be allowed to withdraw his demurrer, and to answer the bill on its merits.

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BETSEY ANN STILES v. THE TOWN OF WINDSOR.

*Exceptions. No. 33 of the Acts of 1870.*

Exceptions do not lie to the decision of the county court in proceedings under the act entitled "An act for the relief of the families of insane persons," approved November 10, 1870. It is only when that court exercises its jurisdiction, substantially, according to the course of the common law, that exceptions lie to its decisions.

THIS was a complaint under the act for the relief of the families of insane persons, approved November 10, 1870, alleging that the plaintiff was the wife of William L. Stiles, whose legal



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settlement was in the defendant town, and who was insane, and confined in the insane asylum at Brattleboro, Vermont; that the income of the said William's estate was not sufficient for the maintenance and support of the plaintiff and the minor children of the said William; and praying that the defendant be ordered to maintain and support said William at said asylum. The court found the following facts:

"The legal settlement of the said William was conceded to be in Windsor, for all the purposes of this proceeding. The evidence showed that the complainant is the wife of the said William; that they have four children living; Frank W., aged 23 years; Clementine, aged 18 years; Fred, aged 16 years; and Asa, aged 13 years; all but the eldest being invalids, requiring to be taken care of and supported by others; that in April, 1869, the said William being then, and ever since, insane, was sent by his wife to the insane asylum at Brattleboro, Vermont, his eldest son, then a minor, going with him, and he has remained there ever since, except that in June, 1870, he escaped, and was out of the asylum a month, having been returned there as soon as he was found. At some time prior to November, 1870, the complainant received notice from Dr. Rockwell, the superintendent of the asylum, that the defendant refused to support the said William longer. Since November, 1870, at which time said eldest son became 21 years of age, the burthen of supporting the family, including the expense of maintaining the father at the asylum, has been borne by him out of the wages of his labor as a workman in the cab shop in Springfield,—his father having had no estate, or income sufficient for the support, either of himself or family; that the expense of the support of the said William at said asylum since November, 1870, has been \$8 per month."

The defendant claimed that it was liable for the expense of supporting him at the asylum, only from the rendition of the judgment in this case. The plaintiff claimed that the defendant was liable to pay such expense from the time this complaint was served, and the court so held, and ordered the defendant to maintain and support the said William at said asylum from and after the service of said complaint, and pay the costs of this proceeding; to which the defendant excepted.

*J. S. Marcy*, for the defendant.

— — —, for the plaintiff.

The opinion of the court was delivered by

Ross, J. The defendant has taken exceptions to the proceedings and action of the county court in making an order upon it, under the act of 1870, fixing the liability of the town to support William L. Stiles, an insane person, the husband of the complainant. The act makes the county court a special tribunal to determine and fix, in a summary manner, the liability of towns in such cases. In its action, that court was not exercising its jurisdiction "according to the course of the common law," but in a new course, different from that prescribed by the common law. By the common law, the town would have had the right to a trial and determination of the facts by the jury. By the act, the facts are all determined by the county court. That court rendered no judgment directly in favor of the complainant, and only granted her relief indirectly, by ordering the town to assume the burden of supporting the husband, and thus removed that burden from resting upon his property, from which the complainant derives, in part, her support. The jurisdiction is conferred upon that court and its proceedings are prescribed by the act. Writs of error or exceptions do not lie to the action of the county court, except when it exercises its jurisdiction, substantially, according to the course of the common law. When it exercises its jurisdiction in a new course, different from that prescribed by the common law, the party aggrieved by its proceedings, must seek redress by *certiorari*, or *mandamus*, or some other proper writ. This was decided early by this court in *Beckwith v. Houghton*, 11 Vt. 602, and has been followed in many subsequent cases. If this court should attempt to revise the action of the county court on exceptions, it is quite probable its proceedings would be held inoperative to bind any one, or to vacate the order made by that court. We have not, therefore, considered the question attempted to be raised by the exceptions.

The exceptions are dismissed, with costs to the complainant.

JOSHUA TRIPP ET ALS. v. HENRY A. HOWE.

*Replevin. Waiver by omitting to plead Dilatory Pleas, and by pleading to the Merits.*

The writ in this case, which was replevin for goods attached, did not require the officer to take a bond conditioned for a return of the property, as well as for the prosecution of the replevin to effect and the payment of costs and damages, and the bond returned was signed by the plaintiffs only. *Held*, that these irregularities did not make the proceedings so void that the court had no jurisdiction of the parties and of the subject-matter of the suit, and that the defendant waived them by omitting to take advantage thereof within the time limited for filing dilatory pleas, and, also, by pleading to the merits.

REPLEVIN for goods attached by the defendant on *mesne* process. The writ was returnable at the May term, 1870, and the replevin bond was returned at the same term. The writ commanded the officer to replevy the goods, "provided \* \* \* shall give a bond in the penal sum of nine hundred dollars, with sufficient surety, to prosecute their replevin to the next stated session of the county court to be held at Woodstock, within and for said county of Windsor, and so from court to court, until the cause be ended, and to pay such costs and damages as the said Howe shall recover." The bond returned was in the penal sum of \$837.42, and signed by the plaintiffs only. The officer returned the value of the goods replevied, as agreed upon by the parties, at the sum of \$418.71. At the December term, 1872, the defendant filed a motion to dismiss for the following reasons:

"1st. Because the writ in this case is not such as the law prescribes. 2d. Because the bond taken in this case and filed with the clerk, is not conformable to the directions in the writ, and is therefore void. 3d. Because the said bond is not such as is prescribed by law, and is therefore insufficient and void."

The court, BARRETT, J., presiding, overruled said motion, *pro forma*; to which the defendant excepted. The general issue was joined on the plea of not guilty. Trial by jury, December term, 1872, and verdict for the plaintiff.

*G. L. Fletcher*, for the defendant.

The writ does not require the officer to take a bond in accordance with the requirements of the Gen. Stat. ch. 35, §§ 13, 14, 15. The bond is not in conformity to the directions in the writ as to the sum, nor as to the sureties. The bond is void because there are no sureties as required by statute. Gen. Stat. ch. 35, § 15; *Campbell v. Morey*, 27 Vt. 575; *Bent v. Bent*, 43 Vt. 42. The plaintiff in replevin is only entitled to his writ by complying with the requirements of the statute, and when he fails in any one of the essential requirements, the same will, on motion, be dismissed. *Sprague et al. v. Clark*, 41 Vt. 6; *Glover v. Chase*, 27 Vt. 533.

*J. F. Dean*, for the plaintiff.

If the defendant desired to avail himself of a motion to dismiss, he should have filed it within the time limited for filing pleas in abatement. The defendant, by pleading to the merits, waived all technical defects, especially if they were not material. 1 Chit. Pl. 358; *White v. Allen*, 30 Vt. 684; *Simonds v. Parker*, 1 Met. 508. The bond was taken under the statute, and, in all the material parts, is right. The defendant errs in supposing the writ to be improper. *Campbell v. Morey*, 27 Vt. 575; *Bent v. Bent*, 43 Vt. 42.

The opinion of the court was delivered by

WHEELER, J. Perhaps, upon seasonable objection, the writ in this case would have been adjudged bad because it did not require the officer to take a bond for a return of the property, as well as for the prosecution of the replevin to effect and the payment of costs and damages, and the bond have been held insufficient for want of surety. But these irregularities did not make the proceedings so void that the court did not have jurisdiction of the parties and of the subject-matter of the suit, and were such that the defendant could waive them. By omitting to take advantage of them by motion or plea within the time limited by the rules of court for filing dilatory pleas, and, also, by pleading to the merits of the action, the defendant did waive them, and

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was not entitled, of right, to take advantage of them afterward. The want of a surety to the bond may have been quite a material defect, and probably the court would have had power to permit the defendant to move to dismiss on account of that defect, out of the ordinary time, if the plaintiff would not make it good by filing a new bond ; but no move in that direction appears to have been made, and upon the motion that was made, at the time it was made, the decision was correct.

Judgment affirmed.

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CHARLES WALKER v. DANIEL P. KING, JOHN B. DURKEE, OLIVER S. CURTIS, JOHN K. FLINT, DANIEL G. BOWORTH, ELISHA FLINT, AND RICHARD WILLS.

[IN CHANCERY.]

(S. C. 44 Vt. 601.)

The petitioner took a mortgage of the equity of redeeming three prior mortgages. The defendants, F. and M., purchased the mortgagor's equity of redemption, and paid therefor the first two mortgages and a portion of the third, and thereupon went into possession of the premises, and they, and their assigns, of whom were the other defendants, ever after occupied the same, and took the rents and profits to themselves.

*Held*, that the defendants were entitled to the rents and profits, without accounting to any one, the same as the mortgagor would have been entitled had the possession of the premises remained in him.

*Held*, also, that the defendants, by subrogation, acquired all the rights which the respective mortgagees had by virtue of their mortgages, to the extent to which they paid off said mortgages, and that said mortgages, to that extent, constituted a part of the defendants' title to the premises, and that the petitioner was always bound to respect said mortgages to that extent.

*Held*, also, that the defendants were entitled to interest on said mortgages, to be computed according to the terms thereof, except as to those which had been merged in a decree, which would bear simple interest only.

PETITION to foreclose a mortgage. The petitioner's mortgage was executed by Cyrus Safford, on the first day of January, 1857, and was subject to three prior mortgages on the same premises, executed by the said Safford, as follows : one to the South Royalton Bank ; one to Edwin S. Wood ; and one to Nancy Safford. The

said Cyrus Safford deceased, and his administrator sold and conveyed said mortgage premises to Benjamin Flint and Lorenzo Mosier, on the 7th of October, 1858, in consideration that they should pay said bank mortgage and said Wood mortgage, and \$800 on the Nancy Safford mortgage. Said bank mortgage was assigned to the state treasurer, who obtained a decree of foreclosure thereon at the May term, 1859, of Windsor county court of chancery, which said decree was, on the 20th of June, 1860, assigned to the defendant Elisha Flint, to whom the said Benjamin had conveyed his interest in said premises; and the said Elisha and the said Mosier, or his administrator, paid the full amount of said consideration, according to the agreement with the administrator of the said Safford. The petitioner was not a party to said decree. Soon after the purchase of said premises as aforesaid, the said Benjamin and the said Mosier went into the several possession thereof, and they, and those claiming under them, of whom are the defendants, have ever since been in possession, claiming to own the same, and taking the rents and profits to themselves.

This cause was remanded from the supreme court at the February term, 1872, with a mandate that the petitioner was entitled to a decree of foreclosure against the defendants, upon payment by him of the sum due upon said prior mortgages which had been paid off by the defendants, and not otherwise; and at the May term, 1872, of the court of chancery, on leave for that purpose granted pursuant to said mandate, the petitioner amended his petition to conform to the facts found by the master in his report theretofore made, and prayed to be permitted to redeem said prior mortgages; and the cause was referred to a master to find the sum due on said prior mortgages, and whether, and for what length of time, the said Benjamin and Mosier, and the defendants, had been in possession of said premises. The yearly rental of said premises was found in said report to be \$400, aside from the buildings and taxes. At the December term, 1872, the master reported the amount of the decree on said bank mortgage at the date thereof, and computed both simple and annual interest thereon from said date, and stated the different amounts, and found that said mortgage was given to secure the said Safford's

bond to said bank in the penal sum of \$4,400, conditioned for the payment of that sum on the first day of January, 1860, with interest semi-annually; and, if said bond should be assigned to the state treasurer, and said bank should at any time neglect or refuse to redeem its circulating notes on demand, then to become due and payable immediately. The amount of said Wood mortgage was reported, with interest computed in a similar manner, and the different amounts stated, as was also the amount of the \$800 paid on the Nancy Safford mortgage. The master found that the Wood mortgage was given to secure notes bearing annual interest, and that the debt secured by the Nancy Safford mortgage was much more than \$800, and did not bear annual interest. The master also found that at the time of the commencement of this suit, the defendants, King, Durkee, Curtis, Jonas K. Flint, Bosworth, and Wills, were each in possession of some portion of said premises, and that they together occupied the whole thereof. The court, at the December term, 1872, BARRETT, Chancellor, decreed that the sum due upon said prior mortgages, and to be paid by the petitioner, was that reported by the master, including the largest sum computed by him as interest thereon. Appeal by the petitioner as to the sum due and to be paid by him.

*W. C. French*, for the petitioner.

This court held in this case at their February term, 1872, that the petitioner must redeem the mortgages prior to his own, which were paid by Flint and Mosier, and the only question remaining open is as to the interest on the sums thus paid by Flint and Mosier.

It appears that the only consideration from Flint and Mosier for the premises deeded them by Safford's administrator, was their agreement to pay said prior mortgages; that they paid said mortgages in pursuance thereof, and immediately upon the conveyance took possession of the premises, and, by themselves and their assigns, have ever since possessed the same, taking the rents and profits to themselves.

We insist that the defendants, having had the possession of the premises, are not in equity entitled to claim interest on the pur-

chase money. To compel the petitioner to pay interest, would allow the defendants to have and enjoy the premises since October, 1858, without any consideration whatever. It is a well settled equitable rule, that in case of an estate for life, charged with an incumbrance, the tenant for life is bound to keep down the interest out of the rents and profits, but he is not bound to pay the incumbrance itself. 4 Kent Com. 74; 1 Greenl. Cruise, 110, 659. The same equitable rule applies in the case at bar. When a grant is subject to a mortgage, the land granted will be primarily liable for the debt, and must be applied to its payment in the first instance, in exoneration of the personal liability of the mortgagor. 2 Lead. Cas. Eq. 242; *Marsh v. Pike*, 10 Paige, 595; *Ferris v. Crawford*, 2 Denio, 595; *Cornell v. Prescott*, 2 Barb. 17. Interest is allowed as incident to the debt on the agreement of the parties, express or implied, or as damages for not paying money when the party ought to pay. *Abbott v. Wilmot*, 22 Vt. 437; *Evarts v. Nason's Estate*, 11 Vt. 122; *Hubbard et al. v. Branch R. R. Co.* 11 Pick. 124. The rule of subrogation is never enforced against the superior equities of third persons. 1 Lead. Cas. Eq. 161, and cases cited.

If the petitioner should be held to pay interest, we insist it should be only simple interest on the state treasurer decree and the Nancy Safford mortgage. Said decree bore simple interest when it was paid, and the defendants cannot be subrogated to any greater or higher rate of interest than the decree bore. Whatever the original cause of action was, it became merged in the decree, the same as in case of a judgment at law. 1 Chit. Pl. 120; *Sawyer et al. v. Vilas*, 19 Vt. 43; *Marshall v. Aiken et als.* 25 Vt. 327; *LeFargo v. Horton*, 3 Denio, 157. The judgment is a new contract of a higher nature, and simple interest only can be cast upon it. The Nancy Safford mortgage bore simple interest, and cannot be changed by the defendants to a debt bearing annual interest.

*S. E. & S. M. Pingree and D. C. Denison*, for the defendants.

The highest cast of the master on the Wood mortgage, is correct. We claim the same on the \$800 paid on the Nancy Safford



mortgage. We also claim the same as to the state treasurer decree, and insist that, at least, the rate due by the contract on which said decree was based, should be allowed as against a subsequent incumbrancer.

The opinion of the court was delivered by

WHEELER, J. The orator appears to have taken a mortgage of the equity of redemption of three prior mortgages. The defendants, Flint and Mosier, appear to have purchased the equity of redemption of the first two mortgages at the price of eight hundred dollars, which they were to pay on the third. The balance of the third mortgage does not appear to have been paid off by any of the parties to this suit, and probably was extinguished by the administrator of the mortgagor, as it was his duty towards these parties to extinguish it. When these defendants purchased the interest and rights of the mortgagor and went into possession, they became entitled to the rents and profits of the premises, without accountability to any one, the same as the mortgagor himself or his administrator would have been entitled had the possession of the premises remained in either of them. And when they paid off the first two mortgages, and eight hundred dollars of the third, they, by subrogation, acquired all the rights which the respective mortgagees had by virtue of their mortgages, to the extent to which they paid off the mortgages. To the extent to which the administrator of the mortgagor extinguished the third mortgage, the orator was not bound to respect it at all, for it was paid by the party who, as to all the other parties, ought to pay it. But the mortgages to the extent to which they were paid off by the defendants, constituted a part of their title to the premises, and the orator was always bound to respect those mortgages to that extent. These defendants, as between their vendor and themselves, were not bound to pay the orator's mortgage, but were to have the premises for what they were to pay on the others, and should they be compelled now to either redeem the orator's mortgage, or permit him to redeem the premises upon payment of what they paid at the time of their purchase, without interest, it would be compelling them to

pay the amount of his mortgage more than they were to pay for the premises, or else to allow him to take the premises from them now at the price they paid for the premises then. This would be holding the defendants to stand all risk of a fall in the value of the premises, and allowing the orator to watch and take advantage of a rise in the value to improve his security, without risk, and would be very unjust to the defendants; while to allow them to stand upon the title which they acquired by paying off the mortgages to the extent they did, just as the mortgagees could have stood upon them if they had held them till now, will be more nearly just to them, and will do no injustice to the orator, for that will permit him to stand as mortgagee of the equity of redemption of the mortgages prior to his, which was where he placed himself when he took his mortgage, and where he was contented to stand ever after, until he commenced this proceeding. He has all the while had the right to foreclose his own mortgage by redeeming the prior ones in the hands of the defendants, all of whom stand upon the rights of Flint and Mosier, but, as he has chosen to lie by and let the interest accrue rather than to do so, he cannot now be permitted to foreclose his mortgage without redeeming those, with interest.

The mortgage to the South Royalton Bank at the time it was taken by Flint and Mosier, had, as against the mortgage premises, become merged in a decree of foreclosure, which bore simple interest only, and the defendants are entitled to simple interest only upon that mortgage. The mortgage to Wood bore annual interest, and was never merged, and the defendants are entitled to stand upon it according to its terms. The Nancy Stafford mortgage bore only simple interest, and that only is claimed by the defendants.

Decree of the court of chancery reversed, and cause remanded, with mandate to enter a decree of foreclosure for the orator upon the redemption by him of the South Royalton Bank mortgage, and the Nancy Safford mortgage, reckoned at simple interest, and the Wood mortgage, reckoned at annual interest.

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Weston v. Cushing et al.

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IRVIN WESTON v. JOSIAH D. CUSHING AND LUCIUS B. WRIGHT.\*

[ IN CHANCERY.]

*Variance. Costs.*

The orator set up in his bill a right as he claimed it, to the use of certain water for his joiner and wheelwright shop, and, to describe the extent of such claim, alleged a contract, and complained that the defendants had prohibited him any use of the water, either to the extent claimed, or less, and prayed, in case his right was not found as broad as his claim, that the extent thereof be ascertained and established. The court found that the orator had a right of the same nature as the one he claimed, though not to the full extent claimed, yet broad enough to render unjustifiable the act of the defendants complained of. *Held*, not a fatal variance, and that the orator was entitled to a decree establishing and defining such right.

The orator having prevailed upon the main issue in the case, though not to the full extent of his claim, yet to a greater extent than admitted by the defendants, was allowed costs.

APPEAL from the court of chancery. The original bill alleged that, in the year 1829, Peleg S. Marsh owned a grist-mill and a saw-mill, and the land whereon the same stood, situate on the east side of the third branch of White River, in Bethel village, and a dam across said branch, and a right to the use of the water of said branch for operating said mills, with which were connected two flumes; that in that year, Daniel Weston, intending to erect a joiner and wheelwright shop a little below said mills, and on the same side of the stream, applied to the said Peleg for a grant of water to operate the necessary machinery thereof; that the said Peleg thereupon bargained and sold to the said Daniel the privilege of taking and conveying in the most convenient manner from said dam, or either of said flumes, water sufficient, and only sufficient, for the purpose aforesaid, except when the water of said stream was so low as not to flow over said dam, in which case the water thus taken was not to exceed a stream of twelve square inches. The bill set out said contract *in extenso*, but the finding of the court renders the further allegations in respect thereto immaterial.

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\* This case was decided at the February term, 1868.

The bill further alleged that, in the year 1830, the said Daniel commenced building said shop, as he had intended, but that a flood carried away all he had built; that in 1834, the orator formed a partnership with the said Daniel, which continued till 1855, during all which time they carried on the joiner and wheelwright business, and that at the time of forming said partnership the orator became an equal owner with the said Daniel of said water privilege; that in 1851, the said Daniel and the orator commenced to rebuild a joiner and wheelwright shop on the same site, and in 1852, when they wanted to take water thereto according to said contract, they were in doubt how best to do so, and therefore consulted the said Peleg in relation thereto, who thereupon made examination of the premises, and advised as to the manner of doing it, and that it was done accordingly, and water taken from the flume of said grist-mill by means of a penstock extending therefrom, through the wall of said grist-mill, to a flume in said shop; that thereafterwards water was thus taken and used for operating the necessary machinery of said shop, without objection on the part of the said Peleg, or any one claiming under him, until the 10th day of September, 1865, when the defendants, the then owners of said mills, commenced interfering with the orator, the then sole owner of said shop and water privilege, in his use of said water, and continued so to do until on or about the 30th day of October, 1865, when they wholly stopped said water, and claimed that the orator had no right to the use thereof in manner aforesaid.

The bill further alleged that the said Peleg died in 1860, and that the said defendants purchased said mills, with full knowledge of the rights of the orator in the premises, and took their deed thereof subject thereto.

*Prayer*, that the rights of the orator to the use of said water be ascertained and confirmed to him, his heirs and assigns, forever, and that the said defendants, and all persons claiming under them, or either of them, be perpetually enjoined, &c.; and for general relief.

The amendment to the bill alleged that, on the 12th of February, 1794, Joel Marsh owned the land whereon the above named

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mills stand, and other land adjoining, and the whole water-privilege therewith connected, and then had a grist-mill and saw-mill, a dam and a flume, thereon, and that there was a fulling-mill situate just below said mills; that on that day, the said Joel, by indenture of that date, duly executed, acknowledged, and recorded, conveyed to one William Burbank, his heirs and assigns, forever, the privilege of the spot whereon said fulling-mill stood, and the privilege of taking water from said flume and dam above his said mills, for the purpose only of operating said fulling-mill at all times when it would not be to the damage of the grist-mill, and an equal right with the saw-mill of drawing water for that purpose, upon condition that the said Burbank, his heirs and assigns, should be at one eighth of the cost and expense of building said dam and flume, and of keeping the same in repair forever; that the rights and privileges thus conveyed to said Burbank came to, and vested in the Bethel Manufacturing Company, and that the said Daniel purchased the same, and said fulling-mill, and other land adjoining, of the said company, and paid therefor, and that it was agreed between the said Peleg and the said Daniel that the deed thereof should be executed to the said Peleg, and that he should re-convey the same to the said Daniel—except a little of the land which adjoined the said Peleg's—and in his conveyance thereof should modify said water privilege so it might be used and exercised for operating the machinery of the shop which the said Daniel intended to build as aforesaid, and that, in pursuance of said agreement, the said Daniel procured said company to execute the deed to the said Peleg, on the 6th October, 1829; that the land so purchased of said company was the land whereon the said Daniel intended to build said shop, and the orator's shop stands on a part thereof; and that, from negligence, the said Peleg never re-conveyed to the said Daniel according to said agreement.

The answer to the original bill denied the allegations thereof in regard to the making of the contract therein alleged, and set out the said conveyance from the said Joel to the said Burbank, and alleged that the said Daniel in 1829, claiming to own the rights and privileges of the said Burbank under said conveyance,

and intending to build a shop as stated in the bill, attempted to make such a contract as alleged in the bill, and to that end reduced such an one to writing, but that the said Peleg refused to sign the same, and that the same never was signed; that when the penstock was put in as alleged in the bill, the said Peleg would not permit water to be taken by means thereof, until the said Daniel and the orator had made some agreement to pay for the use thereof, and that there was always a controversy about said water, and that the said Peleg, and all those claiming under him, always denied the right of the said Daniel and of the orator to take water for the use of a joiner and wheelwright shop, and that the restriction upon the use of said water contained in the said conveyance to the said Burbank, had never been waived, and insisted that the same was in full force, and admitted that the said Daniel and the orator had at all times been at one eighth of the expense of repairing the dam and flumes, as provided in said conveyance, and alleged that they never claimed any right to said water except thereunder, but claimed that by virtue thereof they had the right to use said water for operating the machinery of their said shop.

The answer to the amendment to the bill, admitted the conveyance to the said Peleg by said company, but denied that it was done under the agreement alleged. The further allegations thereof are immaterial.

The answer was traversed, and testimony taken. It appeared that the said Daniel, and other persons, used said water at one time for purposes other than running the necessary machinery of said shop, for which the said Daniel, on the 16th of October, 1858, paid the said Peleg \$226.25, and took his receipt therefor, "for water over drawn in running extra machinery," and that on the 18th of said October, one R. S. Janes paid the said Peleg therefor the sum of \$18.75, and took his receipt expressing it to be, "one quarter's rent from date for water to run the machinery formerly owned by James Weston, at the rate of \$75 per year." The court of chancery, at the December term, 1867, BARRETT, Chancellor, without hearing, dismissed the bill, and the orator appealed.

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Weston v. Cushing et al.

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*Hunton & Gilman* and *J. Converse*, for the orator.

*J. J. Wilson* and *D. C. Denison*, for the defendants.

The opinion of the court was delivered by

STEELE, J. The defendants bought with notice of the orator's claim. They, therefore, took their risk as to its validity. That they were told, or that they believed the claim was unfounded, does not alter the case. They stand on the rights of Peleg S. Marsh, and can make no better defense than he could have made if the suit had been brought against him while living and owning the premises. The orator, in 1862, acquired the interest of Daniel Weston, and now owns the whole "fulling-mill right." If that right, or privilege, is broader or more extended than when first granted in the lease of February 12, 1794, from Joel Marsh to William Burbank, it has become so by reason of some transaction between Daniel Weston and Peleg S. Marsh. There is no record evidence of any such transaction.

I. The orator claims that Daniel Weston made a trade with Peleg S. Marsh, by which Marsh sold him the right to use the privilege in the manner specified in the "unsigned lease." Has the orator established this claim? It is very clear that they had negotiations in the direction indicated by that unsigned instrument, but the testimony from *witnesses*, in our judgment, falls short of proving that they finally settled and agreed upon all its terms, and the evidence from *occupation*, is as consistent with the theory that they had not so agreed, as with the theory that they had settled upon these terms, and the evidence from the *receipts* only tends to show that Weston was treated as having a right to some amount of water for his shop, and not that the extent of that right was defined in the unsigned lease. Our conclusion on this branch of the case is, that the evidence fails to establish a right according to the terms of the unsigned lease.

II. The orator claims that if he is not entitled to the enjoyment of the water according to the terms of this unsigned instrument, he is entitled to use it according to the terms of the original lease from Joel Marsh to William Burbank, *discharged of its limitation to the uses of a fulling-mill*. This claim accords with

the conduct of the parties. The erection of the wheelwright and joiner shop, to be operated by this water, was, unless Marsh had previously consented to the discharge of its limitation to use for the purposes of a fulling-mill, an unusually foolhardy enterprise. The objections which Marsh is shown to have urged against the unsigned lease, were not that by its terms it discharged this limitation, or that he had not consented to the erection of a wheelwright shop, but that the lease by its terms granted too large an amount of water. The receipts for rent indicate that the right of Daniel Weston to *some* water for purposes other than "fulling-mill uses," was conceded. Such, too, we think, is the general tenor of the oral testimony. Add to this the fact or circumstance that it made comparatively little difference with Marsh what use Weston made of the water to which he was entitled, provided it was not used to run a competing saw or grist-mill, and there would seem to be no serious doubt but the wheelwright and joiner's shop was erected in reliance upon Marsh's consent to the discharge of the privilege, or right, from its limitation to the uses of a fulling-mill. So far as Marsh had a material and substantial interest in the limitation, that is, to the extent of restraining parties from the erection of competing mills, we think it reasonable to conclude that he waived no right.

III. Upon this finding of the facts, is the orator entitled to a decree? There would be more force in the defendant's claim, that upon this finding there is a fatal variance between the case as alleged and the case as proved, if the bill depended entirely in contract. It is not so much a proceeding to enforce a contract, as to establish and define the extent of a right. The orator sets up the right as he claims it, and to describe the extent of that claim, alleges the contract; but he complains that the defendants have prohibited him *any* use of the water for his shop, either to the extent he claims it, or less, and he specifically prays the court, in case they do not find his right as broad as his claim, to establish and decree to what extent he is entitled to the use of the water. The wrongful act he complains of, is the defendant's shutting him off from the use of the water for his shop. Upon the finding that the orator has a right of the same nature as the one he claims, and which, though it does not go to the full extent



he claims, is yet broad enough to render unjustifiable the defendant's act which is complained of, the orator becomes entitled to a decree in his favor, establishing and defining that right, in answer to his prayer therefor. The proceeding, when properly considered, not being upon the contract, the rules relating to a variance between the contract as alleged and as proved, do not apply, and the case upon this finding, stands as it would if the defendants had answered, admitting all the court have found, and denying that the orator was entitled to the water according to the terms of the unsigned lease. Heard upon such a bill and answer, the case could have only resulted in a decree for the orator to the extent that his claim was conceded. This reasoning applies to the question of costs. The fundamental issue in this case, stated categorically, is this, has the orator a right to the use of the water for other than fulling-mill purposes? Upon this question, the orator took the affirmative. The defendants took the negative; and took it as well by their answer, as by their act in prohibiting the orator *all* use of the water for his shop. The orator having prevailed upon this question, it would seem no reason for denying him costs, that the court in defining his right do not concede it to the full extent he asks, so long as they give him more than the defendants would admit.

The result is, the court hold that the orator is entitled to a decree confirming to him, his heirs and assigns, the right to use water from the said privilege, unrestricted by, and discharged from, any limitation of its use to the purposes of a fulling-mill, but in other respects, subject to the terms, provisions, stipulations, and restrictions, contained in the lease of said right from Joel Marsh to William Burbank, by them signed, and dated February 12, 1794, and recorded in the town clerk's office of Bethel, February 13, 1794, and subject to the farther limitation, that said water shall not be used by said orator, his heirs or assigns, to run a saw or grist-mill. The orator is also entitled to costs. The *pro forma* decree of the court of chancery is reversed; and it is ordered that the cause be remanded to the court of chancery, to be perfected, and that decree there issue in accordance with the conclusions above stated.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
FOR THE  
COUNTY OF ORANGE,  
AT THE  
MARCH TERM, 1873.

PRESENT:

HON. JOHN PIERPOINT, CHIEF JUDGE.

HON. JAMES BARRETT,  
HON. HOMER E. ROYCE,  
HON. TIMOTHY P. REDFIELD, } ASSISTANT JUDGES.

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RHODA E. BLAIN *v.* ISAAC W. BLAIN.

*Divorce. Bringing of Petition. Authentication and Effect of  
the Records of the Courts of another State. Pleading.*

A petition for divorce was made and dated June 19, 1871, and the summons thereto attached, and the order of notice by publication, were signed by the clerk and issued October 18, 1871. *Held*, that the petition was brought when the summons and order were signed and issued.

A copy of the record of a judgment of the supreme judicial court of New Hampshire, in and for the county of G., was attested by the clerk of said court, with the seal thereof annexed, as "a true copy of record upon a petition for divorce, B. against B.," and certified by the chief justice, that the person by whom said copy was attested, was clerk of said court, and had the keeping of the files, records, and proceedings thereof, and was by law the proper person to make out and certify copies thereof, and that full faith and credit were, and of right ought to be, given to all his official acts and attestations done as aforesaid, and that his attestation of said copy was in due form. *Held*, that said record was properly authenticated.

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Blain v. Blain.

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In divorce proceedings, a former adjudication need not be specially pleaded as a bar, or an estoppel, but may be given in evidence at the trial.

A former adjudication by the courts of New Hampshire, dismissing a petition for divorce for want of sufficient proof of the allegations thereof, is not a bar to granting a divorce in this state for acts of intolerable severity, which were alleged and attempted to be proved in the proceedings in which such adjudication was had, but which occurred in New York, while the parties were domiciled there, when it is not made to appear that the courts of New Hampshire had jurisdiction of causes happening while the parties were residing in another state, and without its jurisdiction.

PETITION for divorce for the causes of intolerable severity, willful desertion for three consecutive years, and neglect to provide suitable maintenance.

The notice to the petitionee was by publication, under an order issued by the clerk. The petition was dated June 19, 1871, and the summons attached, and order of notice by publication, were both dated and issued October 18, 1871, and the case was entered in court at the December term.

It appeared in proof that the petitioner came to reside in this state the first days of August, 1869, and resided in this county ever after. The counsel for the petitioner admitted, and it also appeared in proof, that none of the acts of intolerable severity occurred in this state, and that the desertion did not first occur in this state. It was claimed on the part of the petitionee, that the petitioner, not having resided within this state for two years before the date of the petition, had no right, under the statute, to bring her petition for the two causes last named. The court held that the date and issuing of the summons and order of notice, were to be taken as the time of bringing the petition, and that, consequently, the residence of the petitioner in the state was more than two years; to which the petitionee excepted.

When the trial of the cause had proceeded so far that the petitioner rested, the petitionee offered a copy of the record of a judgment, rendered between these parties in New Hampshire, at the January term, 1869, of the supreme judicial court within and for the county of Grafton, in which cause this petitioner petitioned for a divorce from the petitionee, on the grounds of extreme cruelty and drunkenness; but the claim for divorce not being sustained by the evidence upon either of those grounds, the

Blain v. Blain.

petition was dismissed. The contents of said record are sufficiently stated in the opinion.

Said copy of record was attested by the clerk as follows :

" STATE OF NEW HAMPSHIRE, Grafton County, ss.	}	Supreme Judicial Court, Clerk's Office, December 9, A. D. 1872.
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The foregoing is a true copy of record upon the petition for divorce, Rhoda E. Blain against Isaac W. Blain.

Witness my hand and the seal of said court.

[L. s.]

C. A. DOLE, *Clerk* ;

and was certified by BELLOWS, Ch. J., as follows :

" STATE OF NEW HAMPSHIRE :

I, Henry A. Bellows, Chief Justice of the Supreme Judicial Court for the State of New Hampshire, do hereby certify that Charles A. Dole, Esq., whose signature is affixed to the papers hereunto annexed, is clerk of the supreme judicial court for the county of Grafton and state aforesaid, and hath the keeping of the files, records, and proceedings of said court, and is by law the proper person to make out and to certify copies thereof ; and that full faith and credit are, and of right ought to be, given to all his official acts and attestations done as aforesaid ; and that his attestation to the papers hereto annexed, is in due form of law.

In testimony whereof, I have hereunto set my hand, and

[L. s.] caused the seal of the said court to be hereunto affixed, this 27th day of December, in the year of our Lord one thousand eight hundred and seventy-two.

HENRY A. BELLOWS."

Said judgment was offered as a bar or an estoppel to these proceedings, so far as the question of intolerable severity was concerned. None of the acts of intolerable severity relied upon in this case, occurred in this state, and none of them since the bringing of the libel for divorce in New Hampshire, in which proceedings said judgment was rendered. Said judgment was not pleaded in writing, but was offered to be proved during the trial of the cause, as above stated. It appeared that most of the acts of intolerable severity occurred in Brooklyn, in the state of New York, while the parties resided there.

The petitioner's counsel objected to the admission of said copy of record, on the ground that said judgment was not a bar or estoppel as to any of the acts of intolerable severity, and if it was

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so as to such as occurred in New Hampshire, it was not as to those that occurred out of New Hampshire, and in the state of New York, and that the record was not admissible for any purpose. Also, on the ground that it was not properly authenticated as an exemplification of the record. Also, because it could not be legally admitted without being specially pleaded. The court admitted it, subject to all legal objections. The laws of New Hampshire were not proved in the case.

The court, at the December term, 1872, PECK, J., presiding, granted a bill of divorce for the cause of intolerable severity only, and decided that the judgment in New Hampshire was not a bar to granting a bill for that cause; and further found and decided that the acts of intolerable severity proved, which occurred out of the state of New Hampshire, and in the state of New York, while the parties resided there, were alone sufficient cause to entitle the petitioner to a bill of divorce, without reference to such as occurred in New Hampshire. To the above rulings of the court, the petitionee excepted.

*R. Farnham*, for the petitionee.

The petition was brought, within the meaning of the statute, at the date thereof, and not at the date of the summons and order of notice.

The judgment rendered by the supreme judicial court of New Hampshire, is a bar to this suit. 2 Am. Lead. Cas. 617; *Church v. Wilson*, 9 Wall. 108; Big. on Estop. 173, 208-9; *Kittredge v. Emerson*, 15 N. H. 227; 2 Bishop Mar. & Div. §§754, 766; *Downer v. Shaw*, 22 N. H. 281.

The record was properly authenticated. 2 Am. Lead. Cas. 611; Const. of U. S. Art. 4, §7; Act of Congress, May 24, 1790; 1 Greenl. Ev. §§504-5-6.

*J. T. Allen* and *O. Gambell, Jr.*, for the petitioner.

There can be no bringing of a suit until process of court is made out and issues by authority, and ripe for service. The petition alone is not such process, and forms in no sense a proceeding, in court, until a citation, duly signed by proper authority, is at-

tached thereto. The taking out of a writ is, for some purposes, the commencement of the action. This seems to be according to the common law. *Allen v. Mann*, 1 D. Chip. 94. But there is no writ until signed by authority; and if the writ is not served, no suit is commenced by the issuing thereof. *Day v. Lamb*, 7 Vt. 426, 429. A suit is pending after the service of the writ. *Downer v. Garland*, 21 Vt. 362; *McDaniels v. Reed et al.* 17 Vt. 674.

The record offered in evidence was inadmissible. 1. The judgment it purported to be evidence of, should have been specially pleaded. There is nothing in the nature of divorce suits to distinguish them from other suits in respect to the pleadings, except that sometimes they are regarded as *triangular* in their character, the court, representing public policy, being regarded as a party, and, in the interest of the public, may take notice of things not pleaded, or relied upon by the parties of record. But the question of estoppel is not one in which the public interests are so far concerned as to demand of the court a departure from the rules of pleading, or a disregard of them. In other states, where *re-ordination* or *condonation* is set up in defense, it is required to be specially pleaded. 2 Bishop Mar. & Div. §§336, 338, 341, *et seq.* 2. The paper offered was not a proper exemplification of the record. It should exemplify the pleadings on file, by giving full copies thereof, and a copy of the docket entries ordered by the court, to which should be added a copy of the clerk's record. 3. The proceeding in New Hampshire can in no view be interposed as a bar to these proceedings.

The bill was granted for the cause of intolerable severity only, and the exceptions show, "that the acts of intolerable severity proved, which occurred out of the state of New Hampshire, and in the state of New York, while the parties resided in New York, were alone sufficient cause to entitle the petitioner to a bill," &c. The laws of New Hampshire were not proved, and therefore it does not appear whether or not the courts of that state have power to grant divorces for intolerable severity, when the cause occurred out of the state. If divorces for such causes are not authorized by the laws of that state, it is clear, the court from which this

record comes had no jurisdiction of the subject-matter of that suit, so far as the facts here in question are concerned, and so there was no adjudication of those facts. It must appear affirmatively that the court in that state had complete and concurrent jurisdiction with the courts of this state, of the whole subject and question involved. Big. on Estop. 181.

But even if the New Hampshire court had jurisdiction of the whole subject-matter, and determined the case upon its merits, the petitioner is not estopped by the judgment. It is in the power, and is the exclusive privilege, of every state to determine all questions concerning the social *status* of its own citizens, according to its own laws. The rules which apply to the results of other litigation in cases of other contracts, cannot reasonably be applied to the marriage contract, owing to the peculiar character of it, and to the great variety of consequences arising out of it, affecting not only the individuals immediately concerned, but the public, that have an interest in the social relations of the parties, and the disposition to be made of children, and of the property involved.

The opinion of the court was delivered by

REDFIELD, J. This petition for divorce was made and dated June 19th, and the subpoena and order of publication were signed and issued October 18th, 1871. At the date of the petition, the two years' residence of the libellant in this state provided by statute, had not elapsed; but more than two years at the time the subpoena issued. A writ is "issued," or a suit is "instituted," for some purposes, at the time it becomes a perfected *process*; and sometimes the service of the writ is the commencement of the suit. But we are not aware that the making a writ or petition, without summons or citation, and signed by no magistrate or judicial authority, has ever been held the commencement of the suit, or the "*bringing of the petition or bill.*"

II. The defendant offered the exemplified copy of the record of the supreme judicial court for Grafton county, New Hampshire, of a decree dismissing the petition for divorce between these parties, wherein the alleged causes for divorce were "ex-

treme cruelty and drunkenness." The petitioner insists that such copy of record is not admissible, because; 1st, it is not properly exemplified; 2d, it should have been specially pleaded; 3d, it cannot operate as a bar to these proceedings.

The authentication of the record is in substantial compliance with the act of congress, and we think it is properly authenticated. 1 Greenl. Ev. §§504-5-6.

It is the duty of the court to see that society and the public receive no detriment in proceedings affecting the marital relations of citizens. Petitions for divorce are addressed to the judicial *discretion* of the court; and courts are justified, in some form, in reaching and hearing the proof of every essential fact touching the *character* of such relation. The manner of pleading is measurably addressed to the discretion of the court. And, although in common law proceedings, a former adjudication should be specially pleaded as a bar, or estoppel, where it can be; yet, we think it not error that the court admitted the copy of the record, without special plea.

The more important question is, as to the effect of that adjudication upon these proceedings. "Extreme cruelty" and "intolerable severity," as causes for divorce, are substantially identical. And a decree annulling the marriage relation, by a court having jurisdiction, cannot be collaterally impeached in another state or another jurisdiction.

The record asserts the appearance of both parties; and, *prima facie* at least, the court had jurisdiction of the cause, and of the parties.

A former adjudication between the same parties, operates as an estoppel, because the *same issues* have been *determined* by the judgment of the court having jurisdiction of the parties and the cause. But the judgment of the court of another state can never have any greater force or more extended operation than that given to it by the laws of the state where pronounced, from which it derives its whole force and virtue. *Darcey v. Ketcham*, 11 How. 165; *Harris v. Harderman*, 14 How. 334. This record discloses that the petitioner failed to obtain a decree; and that her petition was dismissed for the want of sufficient proof to



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sustain the averments. The averments in the record, of "cruelty," as cause for divorce, are several, and special as to *time*, but not as to *place*. There is one averment that the defendant treated her with cruelty on a journey from Piermont, N. H. to Brooklyn, N. Y.; and continued the same after her arrival at the latter place. But the laws of New Hampshire are not pleaded or given in evidence, nor is there any averment or proof that the courts of New Hampshire might lawfully annul a marriage for causes that accrued while the parties were domiciled in another state, and without its jurisdiction. Had the court made a decree dissolving the marriage, a presumption would have arisen in favor of the jurisdiction which the court had exercised. But the court *dismissed* this petition; and nothing appears in the record indicating that the court took jurisdiction of, or made inquiry into, causes accruing without the state. The exceptions state that "the acts of intolerable severity proved, which accrued out of the state of New Hampshire, and in the state of New York, while the parties resided in New York, were alone sufficient cause to entitle the petitioner to a bill." This bill was therefore granted for sufficient cause, which does not appear by this record, to have been within the jurisdiction, and adjudicated in the former case. 2 Am. Lead. Cas. 798; Big. on Estop. 181.

We find no error, and the judgment of the county court is affirmed.

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ALANSON G. SMITH v. HENRY SHARPE, AND NATHAN CARPENTER,  
TRUSTEE.

*Conditional Sale. Trustee Process.*

H. & B. sold the defendant a threshing-machine, to be theirs till paid for. The defendant took possession thereof and paid part of the purchase-money, when H. & B., not having a recorded lien thereon, took the machine into their possession, with the defendant's consent, for the purpose of perfecting their lien. While thus in their possession, O., at the defendant's request, and professedly and ostensibly in his interest, and for his benefit, purchased H. & B.'s interest in said machine, and took possession thereof,

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Smith v. Sharpe et al.

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knowing that the defendant had paid part of the purchase-money. C. did not expressly agree to buy the machine for the defendant, or to let him have it and take a lien thereon, or to pay him what he had paid towards it; but the defendant supposed, and had a right to suppose, that C. was buying it for him, and was to let him have it to run, and give him a chance to pay for it. But C. refused to let him have it to run, or to pay him what he had paid towards it, and denied that he had any interest in it. *Held*, that C. could not be held chargeable as trustee of the defendant.

**TRUSTEE PROCESS.** A commissioner was appointed, who reported as follows :

“Early in September, 1871, Hyde & Brown, of Strafford, at the defendant's request, bought a threshing-machine of the manufacturer, at St. Johnsbury, at the price of \$290, and paid \$14 freight thereon to Strafford, and the defendant was to pay them therefor \$45 out of his pension money then due, and the balance in weekly installments to the amount of about \$20 a month, to meet the notes which Hyde & Brown had given for the machine when they bought it, and they retained title to the machine till the defendant paid therefor in full; but they neglected to take a writing witnessing their lien, or if they took one, they neglected to have it recorded within thirty days, as required by statute. About the 8th or 10th of the next October, the defendant having the machine in his possession, and having then used it a little less than four weeks, Hyde & Brown, becoming alarmed on account of having no recorded lien on the machine, so informed the defendant, and, at their urgent request, he consented that they might take full possession and control of the machine, for the purpose, as Hyde represented to the defendant, and as the defendant understood, of getting a proper lien on the machine, and getting it recorded in time. At this time, the defendant had paid Hyde & Brown \$76.63 on the machine. Hyde & Brown, accordingly, took possession of the machine for the purpose aforesaid. Very soon thereafter, the defendant called on Hyde to have the lien perfected, so he could again take the machine. Hyde was ready at any time when Brown came around; but nothing was done.

About the 11th or 12th of said October, the defendant went to see the trustee, Carpenter, with whom he had before, and while threshing for him with the machine, had talk about the matter, and who had then encouraged him that he would help him if Brown did not do right, or should attempt to force him,—and reminded him of what he had said, and asked him to buy out Brown, so he could go along again. Carpenter then promised to, and did, meet the defendant and Hyde & Brown at the village that afternoon, to see about the matter. On looking it over, Carpenter concluded he would not buy one share, unless he bought

the whole; and, finding more due than he expected, said he thought he would have nothing to do with it, and went to the hotel in the village. Hyde asked the defendant what the stick was, and the defendant replied that Carpenter thought he and Brown ought each to throw off ten dollars from the price of the machine. Thereupon, Hyde & Brown agreed to throw off \$14, the cost of freight, and the defendant so informed Carpenter at the hotel; whereupon, Carpenter again went and saw Hyde & Brown, and finally bought their interest in the machine for \$212.55. This he did, professedly and ostensibly, in the interest, and for the benefit of the defendant, and at his request and solicitation, and with knowledge that the defendant had paid said sum of \$76.63 towards the machine. It did not appear that up to this time, Carpenter had seen the machine since the defendant threshed for him with it as aforesaid. On the day after this trade, Carpenter took possession of the machine, and has ever since retained it, refusing, on the demand of the defendant, to let him run it, and *denying that the defendant had any interest in, or right to, the same*, and, also, refusing to pay him any thing for what he had paid towards it.

Testimony was introduced as to the value of the machine at the time Carpenter traded for it as aforesaid, and to show that he paid all the machine was worth. No testimony was given to show, nor was it claimed, that the machine when bought of the maker by Hyde & Brown, was not worth all they paid for it; and from the evidence on the other point, I do not find the machine lessened in value by its use up to the time Carpenter took it, more than the sum of \$14, which was deducted by Hyde & Brown.

I do not find that Carpenter, in express words, agreed to buy said machine for the defendant, or to let him have it and take a lien thereon, or to pay the defendant what, or any portion of what, he had paid on the same. But the defendant understood, and had a right to understand, that Carpenter was doing this for him, and was to let him have and run the machine, with a chance to pay for it.

If, from the facts reported, Carpenter is properly chargeable as trustee, I find him chargeable in the sum of \$76.63, with interest on the same from October 12, 1871. But, if the \$14 deducted from the price of said machine should, by law, enure to the benefit of the said Carpenter, then the sum so in his hands is to be lessened by that amount, and interest on the same from October 12, 1871. And if the court shall be of opinion that, by law, the said Carpenter cannot be held as trustee, then the court will so order in the premises."

The plaintiff claimed that the trustee should be adjudged chargeable for the amount the defendant had paid to Hyde & Brown towards the machine as aforesaid ; but the court adjudged that the trustee be discharged, with costs, unless the plaintiff elected to pay the trustee during the term, the amount that he paid to Hyde & Brown as aforesaid, in which event, the court would adjudge the trustee chargeable, not for a debt, but for the machine as the property of the defendant ; but the plaintiff not so electing, the court discharged the trustee, with costs. Exceptions by the plaintiff.

*Hebards*, for the plaintiff.

*C. W. Clarke*, for the trustee.

The opinion of the court was delivered by

REDFIELD, J. The only question raised in this case is, as to the liability of the trustee upon the commissioner's report. The defendant, Sharpe, bought, conditionally, of Hyde & Brown a threshing-machine for \$304, to be paid for in installments, reserving the title in themselves until the price was paid. As their lien had not been recorded, they became alarmed, and resumed possession of the machine, as security until the price was paid. The defendant had then paid \$76.63 towards the price of the machine. In that state of the case, the defendant induced the trustee to purchase the title to the machine of Hyde & Brown, for the balance due (after remitting \$14), being \$212.55. The commissioner finds that the defendant understood, and had the right to understand, that the trustee "was doing this for him, and was to let him have and run the machine, with a chance to pay for it." But there was no express contract to that effect. The trustee refused to let the defendant have the possession and use of the machine, and "denied that he had any interest in it."

I. The title to the machine was, clearly, in the trustee. The most that can be claimed by the plaintiff, is, that the defendant had paid a portion of the stipulated price, and was "to have a chance to pay" for the whole, and take the title. The defendant

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Strafford v. Blaisdell.

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neither tendered the residue of the price, nor took any means to perfect his title. The plaintiff does not claim that the trustee is liable to repay the defendant the \$76 68 which he had paid towards the machine; but is liable in damages for *denying his right* to pay for the machine.

Where the contract relation of parties is such that *duties* are to be performed, precedent to the acquisition of a right, that duty must be performed or tendered, before the right accrues; and where performance is tendered, the law allows a remedy for enforcing the *right*. If the mortgagee should deny that the mortgagor had a *right to redeem*, it would be novel for the former, without tendering payment, to bring his action for breach of contract. It would rather be "slandering the title," than refusing to perform a *duty* imposed by contract. The *duty*, in such cases, is conditioned and contingent, and never has become absolute.

The court below allowed the plaintiff the full benefit of the *contract* between the defendant and trustee; and we think it the extent of liberality which the law could allow.

Judgment affirmed.

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### THE TOWN OF STRAFFORD v. JOHN K. BLAISDELL.

#### *Assumpsit. Officer.*

The defendant, a constable, having an execution in favor of S. against the plaintiff in his hands for collection, after demanding, but before receiving, payment of the same, advanced the amount thereof to S., at his request, and retained the execution in his hands, and the money when paid thereon, was to, and did, belong to the defendant. Subsequently, the plaintiff, knowing the foregoing facts, paid the amount of said execution to the defendant, with the fees for the collection thereof, without objection. *Held*, that the plaintiff could not recover back the fees so paid.

GENERAL ASSUMPSIT. Plea, the general issue, and trial by the the court, December term, 1872, PECK, J., presiding.

The plaintiff claimed to recover \$39.29 which the defendant, as the plaintiff's constable, demanded and received of the plaintiff as fees for collecting an execution in favor of one Smith

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against the plaintiff, for \$3949.15. Said execution was received by the defendant for collection, July 16, 1870, and on the 18th of the same month, he demanded payment thereof of the plaintiff's treasurer. On the 28th of said July, and before any thing had been collected on said execution, the defendant advanced to the said Smith, at his request, the full amount of said execution, and retained the execution in his hands. On the 29th of said July, Kibling, one of the plaintiff's selectmen, paid the full amount of said execution to the defendant, together with the said sum of \$39.29, fees for the collection thereof.

The defendant testified that at some time previous to the said 28th of July, the said Smith requested him to advance the money due on said execution, and he gave him some assurances that he would, if he could raise the money; that he did raise the money, and advance it to Smith on the day last aforesaid; that when said execution was paid, the money was to be, and was, his money, and that on the occasion when said Kibling paid the execution, and before he paid it, the defendant told him that Smith requested the defendant to advance the money to him on the execution, and that he had done so, and that whatever was coming on the execution would belong to the defendant when he got it; that Kibling paid the execution, including said sum for fees, without objection. It appeared that Kibling knew at the time, that he was paying said last named sum as fees for collecting said execution. The court found the foregoing testimony of the defendant to be true.

The plaintiff claimed that, upon the facts, the defendant was the owner of said execution at the time of its payment as aforesaid, or so far the owner thereof that he had no right to demand and receive fees for the collection thereof, and that the plaintiff was entitled to recover back the amount paid for fees as aforesaid, with interest thereon; but the court rendered judgment for the defendant; to which the plaintiff excepted.

*C. W. Clarke*, for the plaintiff, cited *Chit. Cont.* 548, 551-2; *Cadaval v. Collins*, 4 A. & E. 858; *Close v. Phipps*, 7 M. & G. 586; *Ashmole v. Wainwright et al.* 2 A. & E. 837; *Valpy et als. v. Manley*, 1 C. B. 594.

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*Hebards*, for the defendant.

This being a voluntary payment, it cannot be recovered back. *Stevens v. Head*, 9 Vt. 174; *Corey v. Gale*, 13 Vt. 639; *Winn v. Southgate*, 17 Vt. 355; *Gilson et al. v. Bingham*, 43 Vt. 410; *Williams et als. v. Colby*, 44 Vt. 40; *Wilson v. Ray*, 1 Eng. L. & Eq. 369.

But, if not voluntary, and paid under protest, it cannot be recovered back. The fees for collection were incident to the execution; and a tender of the amount of the execution, without the fees, would have been of no avail. *Joslyn v. Tracy*, 19 Vt. 569.

The defendant did not own the execution, and had no more interest in it after he made the demand than he had before he made it.

The opinion of the court was delivered by

ROYCE, J. It is not claimed but that the defendant at the time he received the execution as constable in favor of Smith against the plaintiff, was legally qualified to execute it. Neither is it claimed that at the time he made demand on the treasurer for the amount, that he had any interest in the execution. But the plaintiff bases his right of recovery upon the claim made that, subsequent to said demand, before payment of the execution, the defendant became the owner of the execution, and hence was incapacitated from demanding and recovering fees for its collection.

We do not think the facts found warrant any such assumption. No express contract of sale was shown, and no such facts as would justify the finding of an implied contract. When the defendant advanced the money to Smith, Smith became his debtor for the amount. The defendant testified that when the money was paid by the town upon the execution, it was to be, and was, his, and that whatever there was coming on the execution, would belong to him. By this we should understand that he acquired the right to retain and apply whatever sum he might receive on the execution, in payment of the money so advanced to Smith. His right to re-payment from Smith, was not dependent upon the collection

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of the execution, and if that had failed of collection, Smith would still have been liable; and, for aught that appears, it was a matter of indifference to the defendant, whether the execution was collected or not. The interest that disqualifies an officer must be a legal interest, and no such interest is shown.

Judgment affirmed.

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## CHITTENDEN COUNTY,

JANUARY TERM, 1872.

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FANNY STOWELL v. WILLIAM C. STOWELL.\*

*Alimony.*

PETITION for divorce, with prayer for alimony, and for the custody of a minor child of the parties. It was stipulated that the petitionee was worth the sum of \$9000, above all indebtedness. Upon granting a divorce, and decreeing the custody of said child to the petitioner, it was ordered, that ten shares of stock in the Howard National Bank of Burlington, of the par value of one thousand dollars, standing in the name of the petitionee, be henceforth the property of the petitioner; that the petitionee pay to the petitioner the sum of five hundred dollars within thirty days, and five hundred dollars every six months thereafter, until the sum of two thousand dollars of principal, besides said stock, be

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\* This case is inserted by request of counsel.—REPORTER.



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paid, with interest on each of said sums after thirty days ; that the petitionee further pay for said child, to the trustee appointed for that purpose, the sum of five hundred dollars at the expiration of each year, until fifteen hundred dollars be paid, with interest on each of said sums, the annual income thereof, and such part of the principal as shall, in the discretion of said trustee, be proper, to be paid to the petitioner for her assistance in the support and education of said child until the age of majority, should she live so long ; otherwise, to be expended by said trustee for the benefit of said child ; that in case of the decease of said child before attaining majority, the balance of said fifteen hundred dollars then remaining, become the property of the petitioner, but to remain during her life in the possession and care of said trustee for her, the annual income thereof, and such part of the principal as shall, in the discretion of said trustee, be proper, to be paid to her for her assistance in her own support, and the balance thereof remaining at the time said child shall attain majority, to be at the disposal of said child ; and in case said child should not live so long, the balance thereof remaining at the decease of the petitioner, to be a part of her estate.



# INDEX.

## ACCOUNT.

1. A bailiff is liable for the "profits which he hath raised or made, or might by his industry or care have reasonably raised or made," out of the property of which he was bailiff. *Gibbs v. Sleeper*, 409.

2. But he is not liable to account in the action of account for the property he received, but which he has not turned into profits, unless he has so disposed of it, or appropriated it to his own use, that he has consumed or wasted it as if it were his own; and that he has converted it to his own use so as to be liable for it in the action of trover, may not be a sufficient appropriation of it to make him liable in account. *Ib.*

*See* CHANCERY, 12.

ACCESSION. *See* CHANCERY, 10.

## ACTION.

1. A trustee suit commenced before a justice of the peace, wherein judgment was rendered against the principal defendant and trustee, was appealed by the claimant only, and continued at the first term, without an affirmance of judgment against the principal defendant. The principal defendant died before the next term, and administration was granted upon his estate, and commissioners appointed. *Held*, that the suit was discontinued by the death of the defendant. *Dow v. Batchelder & Tr.* 60.

2. At common law, an action in the name of husband and wife, for injuries to the wife, does not, on her decease, survive to the husband; but by our statute, such action survives to her administrator. *Earl & wife v. Tupper*, 275.

3. An action upon the statute, for transporting a pauper from one town in this state to another town in this state, or aiding therein, without an order of removal, with intent to charge such town with the support of such pauper, does not survive under §§10, 12, ch. 20, of the Gen. Stat. *Winhall v. Sawyer's Estate*, 466.

*See* DIVORCE, 1.

## AGENCY.

1. On the 7th of May, 1853, the plaintiff let J., his brother, have \$1,500 in money and goods, and by a power of attorney appointed J. his attorney, to buy and sell real and personal property, or to exchange, or trade in, any kind of goods, or to transact any kind of business, in his name, to the amount aforesaid, and thereby authorized J. to use the profits and interest of said sum, from day to day, for his comfort and support, as a compensation for his labor as such attorney. J. received said sum in trust, to be delivered to the plaintiff on demand, and expended most of it in the purchase of a farm and the erection of buildings thereon, which he occupied and carried on, and took the profits thereof to himself, except that occasionally the plaintiff had small sums arising therefrom, but not exceeding three or four hundred dollars in all, and the balance J. expended for stock to put upon the farm. The farm, and personal property upon it, were always treated as the plaintiff's. The whole transaction between the plaintiff and J. was in good faith. On the 11th of June, 1870, the defendant attached, as the property of J., two cows and one heifer upon said farm, which were either purchased with the money so received by J., or sprung from those so purchased. *Held*, that said property belonged to the plaintiff, and was not liable to attachment as the property of J. *Whitcomb v. Cardell*, 24.

2. The plaintiff's son conducted the business of a small store belonging to the plaintiff, under an agreement that he should have a support for himself and family out of it, as a compensation for his services. Both took goods from the store as they wanted for family use, and no account was made of them. While the son was thus in the store, the defendant doctored his wife, and took goods out of the store in payment for his services, which were necessary, by agreement with the son, who had no means of support except what he derived from the store as aforesaid. When he left his father's employ, he credited the defendant's services on the store books; but the plaintiff erased the credit, and brought this suit to recover for the goods thus delivered to the defendant; and it was *held*, that he could not recover. *Morse v. Powers*, 300.

## AMENDMENT.

1. The amendment of specifications ordinarily rests in the discretion of the court, and is not the subject of exception. *Greenwood v. Smith*, 37.

2. Independently of any showing of the day on which an amendment of process is procured, it will be taken to have been on the last day of term. *Burns v. First National Bank of St. Albans*, 269.

*See PRACTICE*, 1.

## APPEAL.

1. In trustee suits commenced before a justice of the peace, an appeal, whether by one of the principal parties, or only by the trustee or claimant, brings the whole case into the county court as to all the parties. *Dow v. Batchelder & Tr.* 60.

2. In general assumpsit before a justice of the peace, the *ad damnum* in the plaintiff's writ, and the sum demanded by the declaration, was ten dollars. The debit side of the plaintiff's specification on trial, was \$38.82, and the credit side, \$32.16; leaving a balance of \$6.66; for which sum, with eighty cents interest thereon, the plaintiff obtained judgment. *Held*, that the action was appealable. *Williams v. Mason, ap't*, 372.

## ARBITRATION.

1. The submission provided that "the costs in the county court shall follow the decision of the arbitrators, and shall follow the judgment of said arbitrators *to be made as in a court of law.*" *Held*, that this provision related only to the costs in the county court, and had no reference to any rule of decision upon the merits, that the arbitrators were to follow. *Edwards v. Harrington*, 63.

2. But treating it as a provision that the arbitrators should decide according to law, *dubitatur*, whether the award could be impeached at law for this cause, as it was regular on its face, and no pretense that the arbitrators exceeded their powers, or omitted to decide any matters submitted, and the award purporting to have been made in accordance with the submission. *Id.*

## ASSUMPSIT.

1. Where the time for the performance of a contract on the part of the plaintiff, specified in a sealed instrument, is enlarged by the parties by parol agreement, the form of remedy is assumpsit, and not covenant, or other action counting upon the contract as under seal. *Smith v. Smith*, 433.

2. The plaintiff contracted with the defendant, under seal, to build a highway in the town of S. (which was laid out for the special accommodation of the defendant, and which the defendant had contracted with S. to build), and to complete it, ready for the acceptance of the agents of S., within a specified time; but he did not complete it within the time. The defendant did not enlarge the time of performance, but suffered the plaintiff to proceed with the work after the expiration thereof,—urged him to sublet a portion of it, which he might have done,—remonstrated against his delay,—notified him that he should claim damage therefor,—

and was present on different occasions when the agents of S. accepted some portions of the road, and made no objection thereto, although some part of the road so accepted was built after the time of performance had expired. *Held*, that the defendant thereby waived his right to object that the plaintiff could not recover at all because he had not performed the contract within the time, but that he was not thereby barred from insisting upon a deduction from the contract price on account of damage occasioned by the delay. *Smith v. Smith*, 133.

3. By the terms of said contract the defendant was to pay the plaintiff one hundred dollars of the contract price, on the completion, and acceptance by said agents, of each one hundred rods of the road, and the balance on the completion and acceptance of the whole road. When this suit was commenced, a portion of the road had been accepted, and the remainder was completed in the manner required by the contract, but said agents had refused to accept the same, although they had had reasonable time and opportunity to do so. *Held*, that the plaintiff was not precluded from recovering for building that portion of the road not accepted, because of the wrongful refusal of said agents to accept it. *Ib.*

4. The defendant rented his house, situate on the line of said road, to a tenant, who relied upon the road's being completed according to said contract; and in consequence of the plaintiff's failure so to complete it, the defendant was compelled to deduct from the stipulated rent. *Held*, that the damage thus sustained was too conjectural and remote for allowance. *Ib.*

5. In consequence of the failure of the plaintiff to complete said road within the time stipulated, the defendant was compelled to construct a winter road for his use. *Held*, that the cost of constructing said road was a proper item of damages to be recouped by the defendant. *Ib.*

See PARTNERSHIP, 10.

#### ATTACHMENT.

1. G., who was not living with his family, and who worked out by the day, and did some jobs, became the owner of a horse in June, 1867, and on the 29th of the next October, it was attached on his debt. On the 18th of the same October, he procured by assignment a bond for a deed of a small farm, and at the date of the assignment, went into possession thereof, and used the horse thereon in drawing off stumps and stone, and drawing up wood, but had been, previous to the attachment, trying to sell the horse, because he had no use for it, and but little hay to keep it on, and at the time of the attachment, was intending to sell it, and buy again in the spring. He also drove the horse a little, and allowed others to drive it on several occasions. He had no other team

at the time of the attachment, and had not had that season, and did not afterwards have that year. *Held*, that such use of the horse was evidence tending to show that it was kept and used for team work, and that the finding of that fact by the county court from the evidence, was conclusive. *Webster v. Orne*, 40.

2. The statute does not require that horses shall be kept and used exclusively for team work, in order to exempt them from attachment. Statutes exempting property from attachment, are remedial, and should be construed liberally in favor of the debtor. *Ib.*

A barber's chair and foot-rest, used by a barber in his business, are exempt from attachment. *Allen v. Thompson*, 472.

*See* RECEIPTOR, 2.

#### ATTORNEYS.

1. As a general rule, an attorney employed as such in a cause, has not thereby the incidental power to pledge the credit of his client by employing another attorney as an assistant. But where the facts in a particular case are such that it may fairly be inferred from them that such authority was given, this general rule would yield. *Willard v. Danville*, 93.

2. Where the agent of a town for prosecuting and defending suits, was not present at the trial of a suit against the town, but was at his home in a town adjoining the place of trial, and had done nothing about the suit, except consult once with the attorney for the town, to determine upon the necessary preparation for defense, and procure the attendance of the necessary witnesses at the trial, in other respects the care and responsibility of the trial being left with said attorney, who resided at the place of trial, nothing appearing to indicate that said agent might not have been seasonably consulted on the subject of employing assistant counsel, nor that any thing transpired, or came to light, rendering counsel necessary, which was not known to said attorney and agent at the time of such consultation, it was *held*, that said attorney had not therefore authority implied by law to bind the town by the employment of assistant counsel in the case. *Ib.*

BILL OF LADING. *See* SALE, 6.

#### BURLINGTON CITY CHARTER.

1. The charter of the city of Burlington, which provides that all warnings for city meetings "shall be issued by the mayor, and published in the manner designated in the by-laws of the city," delegates to the city the right to fix, by a standing by-law, the time and extent of

such publication, and is not controlled by § 12, ch. 15, of the Gen. Stat., which provides how town meetings shall be warned. *Allen v. Burlington*, 202.

### CERTIORARI.

1. It rests in the discretion of the court to grant or refuse the writ of *certiorari*; and it devolves upon the party applying for the writ to show that injustice has been done, and that it may be remedied if the writ is awarded. *Londonderry v. Peru*, 424.

### CHANCERY.

1. When the material facts upon which the orator relies in his bill, are denied in the answer, the rule is well settled that something more than the testimony of one witness is required, to sustain the averments of the bill. What is deemed equal to the testimony of two witnesses is required. *Shattuck v. Gay et al.* 87.

2. Equity requires clear and full proof, to warrant the reforming of a contract, and especially a deed. *Ib.*

3. On the 21st of September, 1857, the defendants, Sanderson Brothers & Co., and the State Bank, relying upon the representations of the U. A. Co. that the latter had been organized with, and had sufficient capital and means to enable them to carry out their contract with F. H. & Co. for the manufacture and delivery, at certain specified times, of a large number of rifles, the interest of F. H. & Co. in which contract had been assigned to the orator, sold to the U. A. Co. a large amount of machinery, tools, and stock, for the manufacture of guns, upon condition that the title thereof should not pass until the payment of the notes of said company, given in consideration of said sale, and payable on demand. The contract of sale provided, among other things, that all the manufactures, and all the sales and transfers of property, by said company, and of all property arising in whole or in part from the proceeds thereof, should be made with the consent of the agent of said defendants, and that such agent should receive all the proceeds of such sales and transfers, and apply in payment of said notes so much thereof, as, in his judgment, was not necessary for said company to have for the payment of laborers and mechanics, and the purchase of stock.

On the 19th of October, 1857, said contract was modified, at the request of the orator, by a supplemental agreement, which provided that said company might go forward and use the property sold as aforesaid, and make up and deliver to purchasers any portion of said stock, from time to time, as the same should be manufactured and ready for delivery, provided all sales were made by said company with the consent of said agent, and the proceeds thereof paid to him according to the original contract; the said defendants reserving the right to stop all use and



sales of said property *on the first, or any subsequent violation of the original contract, touching the said sales and the proceeds thereof.* And it was *held*, that said original contract did not alter or vary the time of payment of said notes. *Rowan v. State Bank et als.* 160.

4. That the proceeds of the sales and transfers of the property embraced within the terms of said contract, which might be applied to the payment of said notes, were in the nature of collateral security, and that said defendants might collect said notes from other means of said company, or pursue their collateral remedy, or pursue both remedies, until they obtained payment of the notes. *Ib.*

5. That said supplemental agreement did not make said notes payable by installment, but that it did constitute an agreement that the payments arising from such collateral security should be made from time to time when said rifles were delivered, and that the said defendants would not, in the collection of said notes according to their tenor, interfere with the property embraced in said conditional sale, unless said company failed to perform the agreement under which they were permitted to use the same. *Ib.*

6. That, under the circumstances, the right of said company to go forward and use said property as aforesaid, or to retain the possession thereof, also depended upon an implied condition that they would perform their contract with F. H. & Co. *Ib.*

7. That the orator acquired no such interest in the property embraced in said conditional sale, by virtue of said supplemental agreement, as to embarrass the rights of said defendants in relation thereto. *Ib.*

8. That the neglect of said company to provide the necessary means for prosecuting the work of manufacturing said rifles, in consequence of which said defendants were compelled to furnish means, or, perhaps, sustain a greater loss, was such a breach of the contract as gave said defendants the right to take and dispose of the property for the purpose for which it was encumbered. *Ib.*

9. Said U. A. Co. was a corporation organized under the laws of Conn., for the purpose of manufacturing guns, and established in that business at Hartford, in that state, and also carried on the same business at Windsor, in this state. Said original contract provided that all parts of guns, and all materials which should be mingled with the property at Windsor, should, as to the sales and proceeds thereof, be subject to the provisions of said contract relating to the property at Windsor. Said supplemental agreement authorized said company to

forward from Windsor to their Hartford factory, any portion of the stock embraced in said original contract; and a portion thereof was forwarded accordingly; so that, on the 3d of April, 1858, the property at Windsor and at Hartford consisted of property embraced in said contract, and of other property belonging to said company, intermingled. *Held*, that the property of said company, so intermingled, became subject to the provisions of said contracts, and that said defendants became mortgagees thereof, and had the right to enter the factory of said company, at both places, and take all of said property. *Rowan v. State Bank et als.* 160.

10. On the 17th of April, 1858, the business of manufacturing said guns ceased to be done by, or in the name of, said company, and thence, to the last of June, was continued by said defendants, without any agency or interference of said company, during which time said defendants furnished a large amount of new material which was used in the business, and was deemed necessary in order to close the business for the best interest of the defendants and said company. *Held*, that no part of the new material thus used was, on the principle of confusion and accession, forfeited by the defendants, it being necessarily furnished in order to complete the work commenced; but that the same became subject to the provisions of said contract as to the property previously purchased by said defendants. *Ib.*

11. After the property embraced in said contracts had been taken into the possession of said defendants by the consent of said company, for a breach of the contracts by said company, the orator attached it as the property of the company. *Held*, that the orator thereby became subrogated to the rights of the company in the property, and that the fact that the property was taken by the consent of the company, was important in determining the rights of the company in relation thereto; but that the orator did not thereby acquire any right to interfere with any prior legitimate transaction between the defendants and said company in relation to the property, or to go back, to object to any *bona fide* contract or payment made prior to the attachment. *Ib.*

12. When one is liable to account for the property of another rightfully taken by him, and which he has managed and disposed of in good faith, and with common prudence and due diligence, he is only liable for the amount actually realized by him. *Ib.*

13. When property held as collateral security is taken into the possession of the creditor in such an unfinished state that a court of chancery would order it finished by a receiver, and the creditor does in that respect what chancery would have ordered, he is properly chargeable with the avails thereof when finished, notwithstanding it was finished

with his property and by his means; but equity requires that the avails thereof should be applied to the extinguishment of the creditor's disbursements in that behalf, before any application is made upon the debt; and any equity acquired by an attachment of such unfinished property as the property of the pledgor, is subordinate to such equity of the creditor. *Rowan v. State Bank et als.* 160.

14. Although a master's report is not final, it will not, ordinarily, be set aside, unless it appears affirmatively that the master was not warranted in his findings by the evidence, or has erred as to the law applicable to the case. *Ib.*

15. The orator alleged in his bill that R., his ward, was the owner of a farm in F., and had a homestead therein, and that he was adjudged a bankrupt, and the defendant appointed his assignee, and that said homestead was decreed to R. by the court of bankruptcy; that R. absconded, and the orator was appointed his guardian; that the defendant thereafter obtained judgment by default against R., before a justice of the peace, without the service of process, notice, or recognizance for review, and levied his execution upon, and set off, said homestead; that it was the duty of the orator, as such guardian, to sell said homestead for the support of R.'s family, but that said levy and set off hindered and impeded his selling the same, and constituted a cloud upon the title thereof; and prayed that said cloud be removed. The answer averred that the court of bankruptcy adjudged that R. had a *homestead interest* in said farm; that the defendant's claim upon which said judgment was founded, was anterior to the acquisition of said homestead, and that said homestead was not exempt from said levy and set off. The case was heard on bill and answer. *Held*, that the case was not one for the interposition of a court of equity. *Rooney v. Soule*, 303.

16. It is a general principle of equity jurisprudence, that a court of chancery will not entertain a bill to impeach a judgment at law, for mere irregularity in the proceedings, but leave such questions arising in legal proceedings, to the exclusive jurisdiction of courts of law. *Wardsboro v. Whittingham and Dover*, 450.

17. Neither will a court of chancery entertain a bill to try the truth of an officer's return by parol testimony; nor to grant relief upon falsifying the record of the doings of a sworn officer in a proceeding at law. *Ib.*

18. The bill alleged that while W. was the owner of a certain farm, the orator purchased and took a deed of him of about one acre thereof, with a dwelling-house and other buildings thereon, and went into the possession and enjoyment thereof; that the same had for a long

time been, then were, and ever thereafter continued to be, supplied with water by means of an aqueduct laid thereto from a spring situate on another part of said farm; that at the time of such purchase, it was mutually agreed between W. and the orator, that the orator had purchased the right to draw water from said spring as aforesaid, but that they omitted to specify said right in the orator's deed, because they supposed it would be conveyed thereby without being so specified; that W. continued to own the residue of said farm for several years thereafter, and never made any claim to said aqueduct; that said aqueduct was visible and apparent, and the defendant, and those under whom he claimed, subsequent to W., had full notice of the existence thereof at the time of their several purchases of the residue of said farm; and prayed for an injunction against interfering with said spring and aqueduct to the injury of the orator, and for general relief. *Held*, that said bill was not defective for want of equity. *Shaw v. Chamberlin*, 512.

19. *Held*, also, that W.; who subsequently parted with all his interest in the residue of said farm, was not a necessary party to said bill, as the bill disclosed one ground on which the orator would be entitled to relief, without addition of parties. *Ib*.

20. After W. conveyed to the orator as aforesaid, and while he owned the residue of said farm, he mortgaged the same to O., who subsequently foreclosed his mortgage, by petition, in the mode prescribed by statute, and made the orator a party defendant to the proceedings. The premises were not redeemed. *Held*, that the decree of foreclosure did not bar the orator's right to said spring and aqueduct. *Ib*.

21. On hearing on bill, demurrer thereto, and plea, the court overruled the demurrer and plea, and entered a decree for the orator according to the prayer of the bill; from which decree the defendant appealed. *Held*, that the defendant was not, therefore, strictly entitled to claim that the chancellor erred in making a final, instead of an interlocutory decree. *Ib*.

22. The orator set up in his bill a right as he claimed it, to the use of certain water for his joiner and wheelwright shop, and, to describe the extent of such claim, alleged a contract, and complained that the defendants had prohibited him any use of the water, either to the extent claimed, or less, and prayed, in case his right was not found as broad as his claim, that the extent thereof be ascertained and established. The court found that the orator had a right of the same nature as the one he claimed, though not to the full extent claimed, yet broad enough to render unjustifiable the act of the defendants complained of. *Held*, not a fatal variance, and that the orator was entitled to a decree establishing and defining such right. *Weston v. Cushing et al*. 531.

23. The orator having prevailed upon the main issue in the case, though not to the full extent of his claim, yet to a greater extent than admitted by the defendants, was allowed costs. *Weston v. Cushing et al.* 531.

COLLATERAL SECURITY. See CHANCERY, 4, 13; SALE, 6.

CONDITIONAL SALE. See SALE, 1, 2, 5, 10; CHANCERY, 3, 7; PARTNERSHIP, 8; SHERIFF, 2; TRUSTEE PROCESS, 1.

CONFUSION. See CHANCERY, 10.

### CONTRACT.

1. P. & K. dissolved partnership, K. taking the partnership property and giving P. a note for \$938, and agreeing to pay all partnership liabilities. K. subsequently failed, without having paid partnership debts to the amount of \$1,500, and informed P. that he could not pay them, and that P. must pay them. Finally, upon K.'s proposal, P. agreed to pay K. \$700, upon being indemnified by certain persons named, against all said partnership debts, which indemnity was given, whereupon P. surrendered said note, and K. paid P. the balance, after deducting \$700, and P. discharged the mortgage given to secure the same. *Held*, that the indemnity was a sufficient consideration for the compromise, and that P. was not entitled to recover said \$700 on said note, the transaction being free from fraud on the part of K. *Parmenter v. Kingsley*, 362.

See CHANCERY, 3, 5, 7; INTOXICATING LIQUOR, 1, 2; SOLDIER'S BOUNTY, 5, 6, 7; SUBSCRIPTION, 1; TOWNS, 3.

COSTS. See CHANCERY, 23.

### COVENANT.

1. An action of covenant for rent will not lie against a lessee where the lease is a deed-poll, signed by the lessor only, although the lessee may have accepted the lease, and occupied and held under it during the full term, without paying the rent reserved. PECK, J., dissenting. *Johnsons v. Muzzy*, 419.

2. In an action of covenant the declaration alleged that, on the 7th of March, 1841, the plaintiff, by deed duly executed, conveyed a certain farm to the defendant, reserving to himself the fruit of the orchard for ten years, and that the defendant, in and by said deed, covenanted to keep the orchard well fenced, and to preserve it from depredation by cattle, &c. Plea, *non est factum*. The defendant accepted said deed, and

possessed and held under it, but it was signed and sealed by the plaintiff only. *Held*, that it was not, in legal contemplation, the deed of the defendant, and that covenant would not lie. *House v. Foster*, Washington county, 1852, cited by ROYCE, J. *Johnsons v. Muzzy*, 419.

*See ASSUMPSIT*, 1.

#### CRIMINAL LAW.

1. A complaint under the act of Nov. 8, 1865, (Gen. Stat. 891) for the protection of deer, alleged that the respondent "did \* \* chase, drive, worry, and kill a live animal called a deer." *Held*, not bad for duplicity. *State v. Norton*, 258.

2. The objection that a memorandum of the names of the witnesses in support of the prosecution, is not subjoined to a grand juror's complaint, is in the nature of a dilatory plea, and must be made at the earliest opportunity, or it will be considered as waived. *Ib*.

3. The complaint alleged the offense to have been committed on a certain day named, which was within the period during which the statute prohibited the act. *Held*, sufficient without a distinct allegation that the offense was committed within such period. *Ib*.

4. It was held unnecessary in a complaint under said act to exclude by averment the exception in the third section of the act. *Ib*.

5. Said act is constitutional. *Ib*.

6. On trial of an indictment for manslaughter, the court charged the jury that, "if they were convinced beyond a reasonable doubt that the death of the decedent was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment \* \* \*. That all killing is presumed to be unlawful; and when the fact of the killing is established, it devolves on the party who committed the act to excuse that killing—to show that it was justified—in order to escape the legal consequences which attach to the commission of the act." *Held*, error; and that, exculpatory evidence having been given on trial, the jury should have been instructed, in substance, that, upon all the evidence, they must find beyond a reasonable doubt that the crime charged in the indictment was committed by the respondent, in order to warrant his being found guilty. *State v. Patterson*, 308.

7. The case of *State v. Hooker*, 17 Vt. 670, commented upon and explained. *Ib*.

8. The idea embraced in the expression that *a man's house is his castle*, is, not that it is his property, and that, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity, is, that it is sacred for the protection of his person, and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle, in order to reach the inmate. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in, by any means rendered necessary by the exigency—and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault. *State v. Patterson*, 308.

9. Where the defense can legitimately claim that there was an assault on the respondent's house, with the intent, either of taking his life, or of doing him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under the circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and in fact did believe, that it was necessary in order to prevent the commission of such crime. *Ib.*

10. In case the purpose of an assailant is to take life, or inflict great bodily harm, and the object of his attack upon a house is to get access to the occupant for such purpose, the same means may lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case, the point of justification is, that such use of fatal means was necessary in order to the rightful, effectual protection of the respondent, or his family, from the threatened or impending peril. *Ib.*

#### DAMAGES.

1. In an action by the administrator of the wife, for injuries to her, no damages can be recovered for any loss of the labor of the intestate, that belonged to her husband. *Earl & wife v. Tupper*, 275.

2. In awarding exemplary damages, the jury must be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action. The expenses of the

plaintiff for counsel fees, and other trouble in the suit not taxable costs, are not a proper element of such damages. *Earl & wife v. Tupper*, 275.

3. An administrator, in an action for injuries to his intestate, may, in a case otherwise proper for their allowance, recover exemplary damages. *Ib.*

4. The imposition of a fine in a criminal proceeding for assault and battery, will not bar or mitigate the party's liability to exemplary damages in a civil suit for the same act. *Hoadley v. Watson*, 289.

5. Such damages are recoverable with the ordinary damages, under the common allegation that the act declared for was done to the damage of the plaintiff. *Ib.*

6. The expenses of the plaintiff for counsel fees, and other trouble in the suit not taxable costs, are not a proper element of exemplary damages. *Ib.* *Earl & wife v. Tupper*, 275.

See ASSUMPSIT, 4, 5.

#### DEED.

1. A deed described one line of the land thereby conveyed as running "north, 84 degrees west, on said M.'s line and C.'s north line, 45 rods and 16 links, to the bound begun," which was the line in dispute. At the time of the execution of said deed, the land of M.—who was the grantee in said deed—which was contiguous to the land conveyed thereby, and on the line of which the disputed line was described as running, extended northerly only to a brook which intersected said last mentioned line. On the opposite side of the brook, C.'s land was situated, extending several rods further north-easterly along the brook than the point where "said M.'s line" terminated at the brook, so that, if the disputed line should be continued in the same course across the brook to the place of beginning, said deed would include a portion of C.'s land lying south of and adjoining the land of the grantor conveyed by said deed. In order for the line in question to reach and run on C.'s north line, it would, at the point where it reached C.'s land at the brook, have to turn nearly at a right angle, and run north-easterly on his line a few rods, to the corner of his land, then turn at an acute angle, and run on his north line in a course, north,  $67\frac{1}{2}$  degrees west. At the time of the execution of said deed, C.'s north line was marked by a log and slash fence on the land, and as nearly on the line as such fences usually are. *Held*, that the monuments and abutments, and not the course, controlled the construction of said deed, and that the land thereby conveyed was bounded along the line in question by the said lands of M. and C. *Bundy v. Morgan*, 46.



2. If one in possession of land of which he has no title, or color of title, procures a deed thereof from another to his wife, the possession held by him thereafter, and by his wife after his decease, is to be referred to the apparent right acquired by such deed, and the color of title given thereby. *Austin et als. v. Rutland R. R. Co. et als.* 215.

3. The defendant, by deed of warranty, conveyed certain land to S. by metes and bounds, and in the premises of the deed, immediately following the description, was this clause: "Conditioned that no building or erection is ever to be made on said land, except a dwelling-house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges, and interests of said Arms, or his heirs or assigns, to a greater degree than a dwelling-house and out-buildings as aforesaid would affect his and their rights, interests, and privileges; the said Arms being now the owner of a house and land westerly of, and near, said premises; and conditioned, also, that no building is to be erected on said land, which shall extend more than twenty feet southerly of the main body of the dwelling-house now owned and occupied by the said John Arms." In all other respects, said deed was in the usual form of a warranty deed without condition. *Held*, that said clause did not constitute a condition precedent or subsequent; nor a covenant that the grantee would abide by the terms thereof; but was a part of the description of the estate, or interest, which passed by the deed to the grantee, and showed, with the rest of the description, what rights in the land passed to the grantee, and what were left remaining in the grantor; and that, the land passing to the grantee with the use thereof thus restricted, those claiming under the grantee could not make erections thereon in violation of those restrictions. *Fuller v. Arms*, 400. ;

*See* CHANCERY, 2.

## DEPOSITION.

The authorization of an indifferent person to serve a citation upon a party to be present at the taking of a deposition, is a judicial act, and requires the exercise of judicial discretion in adjudging that the precept would fail of service for want of a proper legal officer, and in deciding upon the person to serve it. Therefore, such authorization by a magistrate who was counsel for one of the parties, would be invalid, and the deposition taken under such a citation would be excluded. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

2. The citation served upon a party to be present at the taking of a deposition, should state the name of the magistrate before whom the deposition is to be taken; and if not so stated, the deposition will not be admitted. *Id.*

3. Notice was given to take the deposition of Mrs. J. V. Perley. The deposition was signed by Emily A. Perley, who was the wife of J. V. Perley, and the same person named in the notice, which the party notified knew. *Held*, that the deposition was not thereby rendered inadmissible. *Kent v. Buck*, 18.

4. The citation for taking a deposition described the parties as, "Aretus Stephens is plaintiff, and Margaret Joyal, so called, administratrix of the estate of Joseph E. Joyal, is defendant." The caption described them as, "Aretus Stephens as plaintiff, and Margaret Joyal, so called, is administratrix, is defendant." On the docket the case was entitled, "Aretus Stephens v. Joseph E. Joyal's Estate." The said Margaret was in fact the defendant in the suit. *Held*, that the deposition was admissible. *Stephens, ap't, v. Joyal, adm'x*, 325.

#### DISCHARGE IN BANKRUPTCY. *See* JUDGMENT.

#### DIVORCE.

1. A petition for divorce was made and dated June 19, 1871, and the summons thereto attached, and the order of notice by publication, were signed by the clerk and issued October 18, 1871. *Held*, that the petition, was *brought* when the summons and order were signed and issued. *Blain v. Blain*, 538.

2. In divorce proceedings, a former adjudication need not be specially pleaded as a bar or an estoppel, but may be given in evidence at the trial. *Ib.*

3. A former adjudication by the courts of New Hampshire, dismissing a petition for divorce for want of sufficient proof of the allegations thereof, is not a bar to granting a divorce in this state for acts of intolerable severity, which were alleged and attempted to be proved in the proceedings in which such adjudication was had, but which occurred in New York, while the parties were domiciled there, when it is not made to appear that the courts of New Hampshire had jurisdiction of causes happening while the parties were residing in another state, and without its jurisdiction. *Ib.*

*See* STOWELL v. STOWELL, 552.

#### EJECTMENT.

1. A railroad company, owning one undivided moiety of land in fee, and the life estate of A. in the other moiety thereof, being in the exclusive possession, duly located their railroad thereon, and appropriated the whole thereof for the ordinary, necessary, and legitimate purposes of the road, and continued to thus use and possess the same after the termina-

tion of said life estate, to the exclusion of the remainder-men, and without the appraisal, or payment, of land damages under the statute, or otherwise, to the remainder-men. *Held*, that on account of the peculiar and extraordinary character of the subject-matter of the case, the remainder-men could not maintain ejectment against said company, to recover joint possession of said premises. *Austin et als. v. Rutland R. R. Co. et als.* 215.

2. Sec. 26, ch. 28, Gen. Stat., affords a remedy in cases where a railroad company has taken possession of land for the construction of their road, without paying the land damages, or having them appraised, and supersedes the common remedy by ejectment, which is available in ordinary cases between tenants in common. *Ib.*

3. Owners of land bordering on the waters of Lake Champlain, have no title to the soil beyond low-water mark, nor right appurtenant, but only a statutory right, to build wharves and store-houses into the lake, in front of their land. Therefore, if land be made by a stranger by filling in earth in front of their land, from low-water mark into the lake, and wharves and docks be built thereon, they cannot maintain ejectment therefor. *Ib.*

ESTOPPEL. *See* SUBSCRIPTION, 2.

#### EVIDENCE.

1. The admissions of a party are admissible against him. *Kent v. Buck*, 18.

2. A woman who has had experience as nurse in childbirth, and, as such, been in attendance at premature births, may testify as an expert to her opinion as to whether the birth of a child was premature. *Masons v. Fuller*, 29.

3. A witness testified that her husband died at a certain time, but that she was not with him when he died, nor present at his burial, and had no personal knowledge of his death, and only knew it from what his folks had told her and written her. *Held*, that the testimony was competent proof of the fact of death. *Ib.*

4. The rule as to the admissibility of parol evidence to vary written agreements, does not touch the validity of the agreement sought to be proved, but only the kind of evidence by which the party may be compelled to prove it; and if the agreement is admitted on trial, or by the pleadings, or is proved without objection, by parol evidence, it is a waiver of the rule, and becomes the agreement, as fully operative as if it had been proved by a writing. *Davis v. Goodrich*, 56.

5. In an action in the name of husband and wife to recover for personal injuries to the wife, the defendant introduced testimony to prove that the husband, soon after the injury, in the presence of his wife, told the witness that the infirmity of his wife was caused by overwork in gathering and boiling sap. *Held*, that it was competent for the plaintiff to show by the same witness, and as part of the same conversation, that the wife then denied her husband's statement, and declared that she had not gathered and boiled sap. *Lindsey & wife v. Danville*, 72.

6. When it is important to show the bodily condition of a person at a certain time, what such person says to an examining physician at such time, about the then nature, symptoms, and effects of the malady then upon them, is proper evidence. *Earl & wife v. Tupper*, 275.

7. When the condition and health of a woman during some period of her pregnancy, are material to be shown, the fact that the child had spasms, or convulsions, at birth, may be weighed with other circumstances in the case bearing upon the condition of the mother after the time her condition became important, for the purpose of determining what her condition, while it was important, in fact was. *Ib*.

8. The professional opinion of a medical expert, based upon hypothetical facts, may be received in evidence before proof of any, or only a part, of the facts supposed, if the court is satisfied that the party, in good faith, intends to offer proof of such facts. *Ib*.

9. When on cross-examination the reliableness of a witness's testimony is forced to depend mainly on what appears upon books of entry kept by the witness in relation to a certain business transacted by him, and out of which the matter in controversy arose, and as to his mode of doing which he had testified in chief without objection, it is legitimate for the other party to show fully the manner in which such business was transacted, and how such books were kept, as corroborative of the testimony of the witness; and such books are evidence for the same purpose. *Missisquoi Bank v. Everts*, 293.

10. It is not necessary in order to make dying declarations admissible in evidence, that the declarant should state everything constituting the *res gestæ* of the subject of his statement; but only that his statement of any given fact should be a full expression of all that he intended to say as concerning his meaning as to such fact. *State v. Patterson*, 308.

11. The fact that a witness by whom dying declarations are sought to be proved, reduced the declarations to writing at the time they were made, but has lost the memorandum, does not bear upon the question of their admissibility, but only upon the reliability of the recollection of the witness. *Ib*.

12. Upon the question of whether the witness's father was living in October, 1855, the witness testified that he supposed he died in 1854. On cross-examination the witness denied having said that he received a letter in 1861, stating that his father was dead, but that he knew better, as the letter was in his father's handwriting,—and also denied telling his sister-in-law in 1861, that his father had gone back to live with his mother again; and it was *held* error for the county court to exclude testimony offered by the other side, to prove that the witness had made the statements which he denied. *Stephens, ap't, v. Joyal, adm'r.*, 325.

13. It is not competent to show by extrinsic evidence when a record was made. *Winhall v. Landgrove*, 376.

14. In case for injury to the plaintiff's horse, occasioned by the defendant's overloading and overtasking it in drawing a load of ashes with it and another horse, from C. to R., it was *held*, that the plaintiff could not ask witnesses who had previously drawn ashes over the same route, and who drew ashes in company with the defendant on the day of the alleged injury, and had testified as to the condition of the road that day, and as to the weight of the defendant's load, and that they were acquainted with the horses the defendant had, and knew about his wagon,—whether, in their opinion, the defendant's horses were unreasonably loaded, and what would have been a reasonable load, under the circumstances. *Oakes v. Weston*, 430.

15. An officer's return in pauper proceedings, is, at least, *prima facie* evidence, as between the parties, of the truth of the service therein stated. *Windham v. Chester*, 459.

16. When the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, the witness is allowed, to a certain extent, to add his conclusion, judgment, or opinion. *Bates v. Sharon*, 474.

17. The vendor of a cow exchanged a pair of horses for a mare and the cow, which he sold to the defendant, and took his note therefor. In a suit upon said note, the defendant, for the purpose of showing fraud by the vendor in the sale of said cow to the defendant, and as tending to show his knowledge of her worthless condition, claimed on trial that the vendor gave little or nothing for said cow; and, as bearing upon that question, introduced evidence, against the plaintiff's objection, to show that said pair of horses was of small value. *Held*, that such evidence was too indefinite to warrant an inference that the vendor knew the condition of said cow. *Bryant v. Pember*, 487.

18. In trover for a yoke of oxen, the plaintiff claimed title as conditional vendor thereof to one H., who sold them to the defendant. The defendant claimed that said sale to H. was absolute. After his sale to the defendant, H. failed, owing the plaintiff a small sum besides the debt for said oxen. Many of the creditors of H. brought suit and attached his property, which the plaintiff knew, but he did not commence suit. *Held*, that, as tending to show the plaintiff then supposed he had a lien on said oxen for the payment of the price at which he sold them to H., and that his conduct then was consistent with his claim on trial, it was competent for him to testify that he forbore to sue, because he had such lien, and had rather run the risk of losing his other claim than to be at the trouble and expense of a suit. *Pollard v. Bates*, 506.

19. The defendant introduced a composition deed, which never became operative, signed by the plaintiff, and other creditors of said H., after the sale of said oxen to the defendant as aforesaid, and claimed that it tended to show that the plaintiff had no lien on said oxen, else he would not have signed it. *Held*, that, to rebut such inference, the plaintiff might show that at the time he signed said deed, he said he had a claim on said oxen for \$225—the price he sold them at—that he looked to the defendant for the oxen—and that it was understood that said deed did not include his claim for them. *Ib.*

20. A copy of the record of a judgment of the supreme judicial court of New Hampshire, in and for the county of G., was attested by the clerk of said court, with the seal thereof annexed, as “a true copy of record upon a petition for divorce, B. against B.,” and certified by the chief justice, that the person by whom said copy was attested, was clerk of said court, and had the keeping of the files, records, and proceedings thereof, and was by law the proper person to make out and certify copies thereof, and that full faith and credit were, and of right ought to be, given to all his official acts and attestations done as aforesaid, and that his attestation of said copy was in due form. *Held*, that said record was properly authenticated. *Blain v. Blain*, 538.

EXCEPTIONS. *See PRACTICE*, 12, 15, 17.

#### EXECUTORS AND ADMINISTRATORS.

1. The administrator of the wife can maintain any proper action at law against the husband for the enforcement of her rights of property. *Roberts, adm'r, v. Lund*, 82.

*See DAMAGES*, 1, 3.

EXPERTS. *See EVIDENCE*, 2, 8.

## FRAUDS, STATUTE OF.

1. The mere delivery of goods to the vendor, is not sufficient to take a case out of the statute of frauds ; he must accept and receive them. *Gibbs v. Benjamin*, 124.

## FRAUDULENT CONVEYANCE.

1. If a husband, to avoid being compelled by the town to contribute to the support of his pauper mother, conveys land to his wife without consideration, such conveyance is good between the parties; for the law will not permit a party to allege his own fraud, to avoid his contracts, or the legal consequences of his own act. *Roberts, adm'r, v. Lund*, 82.

## HIGHWAYS AND BRIDGES.

1. The citation attached to a road petition, brought to the supreme court under §64, ch. 24, Gen. Stat., must be to the defendant town; and if only to the selectmen of such town, naming them, although properly served on them, the petition will, on motion, be dismissed. *Drown et als. v. Barton et als.* 33.

2. Towns are bound to construct highways reasonably sufficient with reference to such accidents as should be expected occasionally to occur. *Lindsey & wife v. Danville*, 72.

3. A highway was rendered impassable by a freshet. One of the selectmen, pursuant to a previous understanding among the selectmen that each should take charge of the matters pertaining to the duties of the office in their respective parts of the town, and that what each did should be concurred in by the others, placed a barrier across the highway for the purpose of preventing travelers from passing over it while thus out of repair, and of turning the travel, for the time being, and until the highway was repaired, around the foundrous portion of the highway, over a hill road, which was a private way, not adopted by the town. *Held*, that this constituted a temporary adoption of the private way as a substitute for the highway while not in condition for use, and that the town thereby became liable for damage occasioned by reason of the insufficiency and want of repair of said private way. *Dickinson v. Rockingham*, 99.

4. *Held*, also, that when said private way thus became a substitute for the highway, it became such for all travelers, as well those who had occasion to use it in going to and from houses situate thereon, as those who used it to pass around the foundrous portion of the highway. *WHEELER and ROYCE, J. J.*, dissenting. *Id.*

5. If a married woman receive an injury by reason of the insufficiency of a highway, it is sufficient if the notice to the town be signed by her alone, and not signed by her husband. *Church & wife v. Westminster*, 380.

6. Under §65, ch. 24, of the Gen. Stat. (which provides that, "when any town shall deem itself oppressed by being required to build, make, or put in repair, any bridge or road, located or laid out by the county or supreme court, in or through such town, which is evidently for the accommodation of other travel than that of the inhabitants of such town, the selectmen of such town may make application to the county or supreme court, for remedy"), the county court has jurisdiction to appoint commissioners, and compel towns benefited by a road already laid out and built, to contribute to the expense of maintaining and keeping the same in repair. *Jamaica v. Wardsboro & Townshend*, 416.

7. The questions, whether a town in the vicinity of the town in which a road is laid, will be specially benefited by such road, and whether the part of the expense of building the road, which is apportioned to such town, is just and reasonable, are matters of fact, exclusively within the jurisdiction of the commissioners and the county court. *Londonderry v. Peru*, 424.

8. After a road has been built, so that the amount of the part of the expense of building apportioned to a town can be ascertained, the county court may order the town to pay the specific sum, and issue execution therefor. *Ib.*

9. A highway surveyor is bound *at all times* to keep the highways in his district in good and sufficient repair, irrespective of the amount of the highway-tax committed to him, and without the direction and authority of the selectmen; and for all necessary expenditures made by him for that purpose, beyond the amount of his tax-bill, and out of means not furnished by the town, the town is liable. *Stockwell v. Dummerston*, 443.

10. The act of 1864, fixing the wages of a man at fifteen cents an hour, and the price for teams, carriages, and tools, employed in repairing a highway, at such price as the town or selectmen shall establish, applies only to such persons as furnish work on the highway, or teams, carriages, and tools, in payment of a tax assessed against them. *Ib.*

11. If a town is excusable for delaying the repairs of a defective highway, because impracticable to repair until the frost is out of the ground, it is the duty of the town, in the meantime, especially when



practicable, to provide a side-way around the defective place, with proper barriers and guides to indicate to travelers that the side-way is temporarily substituted for the highway. *Bates v. Sharon*, 474.

12. But whether it can be assumed as matter of law, or not, that such duty rests upon a town, it would be error for the county court to assume as matter of law that it does not, and the refusal of a request to charge, requiring such assumption, is not error. *Ib.*

13. When the selectmen of a town, on application for that purpose, refuse to lay out a highway therein, any three or more freeholders of the town or vicinity, although not the same persons who signed the petition to the selectmen, may make application to the county court for that purpose, under § 44, ch. 24, of the Gen. Stat. *Moore et als. v. Chester*, 503.

14. Such application, when brought within a reasonable time, is in season, although not brought to the next term of the court, and more than twelve days intervene between the refusal of the selectmen and the next term. *Ib.*

15. Petitioning for a highway to be laid to the line of a town, there to connect with a proposed highway to be laid through an adjoining town, thence into an adjoining county, is not petitioning for a highway to be laid out of the former town. *Ib.*

#### HOMESTEAD.

1. Under the statutes of this state, the homestead of a debtor is exempt from attachment upon debts contracted after the filing of the deed thereof in the town clerk's office, and before the occupation of the premises by the debtor as a homestead, when he is in such occupancy at the time of the attachment. *Lamb v. Mason*, 500.

2. The case of *West River Bank v. Gale*, 42 Vt. 27, cited and approved *Ib.*

#### HUSBAND AND WIFE.

So long as any act remains to be done to bring the avails of the wife's choses in action to the beneficial use of the husband, her right of survivorship remains. *Roberts, adm'r, v. Lund*, 82.

#### INFANCY.

1. The plaintiff's son of eleven years, purchased of the defendant, a shop-keeper, cigar-holders and fancy pipes in cases, and paid therefor

\$4.75 in money. The next day the plaintiff's wife, and child's mother, went with the boy to the defendant's shop, and tendered back said articles, and demanded the money paid therefor, which the defendant refused to pay back. The plaintiff thereupon brought this suit to recover the money; and it was *held*, that he could recover. *Sequin v. Peterson*, 255.

2. *Held*, also, that said demand by the plaintiff's wife, if one was necessary, was sufficient. *Ib*.

### INTOXICATING LIQUOR.

1. The agent of the plaintiffs, who were wholesale liquor-dealers in New York, was authorized to take orders for liquors, and to agree on the price and time of payment; but the plaintiffs, by an understanding with said agent, had a right to reject his orders if they chose. The defendant, a tavern-keeper in Whitingham, in this state, having no knowledge of such understanding, contracted with said agent, at Whitingham, for a bill of liquors to be sent him by the plaintiffs; and said agent accordingly ordered the liquors from Brattleboro, by letter, and they were sent to the defendant, and retailed by him at his bar. *Held*, that said contract of sale was made in this state, and void. *Erwin & McKelsey v. Stafford*, 390.

2. The defendant himself subsequently ordered a bill of liquors, by letter sent directly to the plaintiffs in New York, which were sent, and retailed by him as aforesaid. *Held*, that the sale thereof was made in New York, and valid. *Ib*.

3. The plaintiffs charged said liquors to the defendant as they were sold, and the defendant made payments therefor while the account was running, and the money paid was credited to him. The plaintiffs presented the whole account, debt and credit, before the auditor for adjustment, and the defendant treated the whole account thus presented as proper to be settled in this action. *Held*, that therefore no question arose as to whether the defendant could recover back any of the money thus paid; but that the charges were to be determined according to their validity to go into the accounting, and to affect the general result accordingly, and that the credits were to be treated as payments upon the running account, and not as payments upon any particular item, or bill, of the account, and were to be computed in favor of the defendant in arriving at the ultimate result. *Ib*.

### JUDGMENT.

1. The recovery of a judgment upon a contract induced by fraud, is a waiver of the fraud, and the judgment is not a debt *created* by fraud,

within the meaning of the bankrupt act; and the plea of a discharge in bankruptcy, is a good defence to an action of debt founded upon such judgment. *Palmer, ex'r, v. Preston*, 154.

#### JURISDICTION.

1. In actions of trespass on the freehold, the *ad damnum* in the writ is the "sum in demand," within the meaning of the statute conferring jurisdiction of such actions upon justices of the peace, and determines the jurisdiction. *Montgomery v. Edwards*, 75.

2. A justice of the peace has jurisdiction of the offense created by the act of November 8, 1865, (Gen. Stat. 891), for the protection of deer, *State v. Norton*, 258.

#### LAKE CHAMPLAIN. See EJECTMENT, 3.

#### LANDLORD AND TENANT.

1. Notice to quit is never necessary, unless the relation of landlord and tenant exists. *Chamberlin v. Donahue*, 50.

2. If one in possession repudiates the relation of tenant to his landlord, demand of possession, or notice to quit, is not necessary. *Ib.*

3. An agreement by the tenant to pay rent, is an essential element of a tenancy from year to year. *Ib.*

4. A tenancy at will may always be determined by any act or declaration inconsistent with the continued voluntary relation of landlord and tenant. *Ib.*

5. Whether one be in possession of land under an implied license, or as tenant at sufferance, or at will, the commencement of an action of ejectment against him by the owner, determines his relation, and his possession thereafter becomes wrongful. *Ib.*

#### MANDAMUS.

1. The writ of mandamus is subject to the legal and equitable discretion of the court, and ought not to be issued in cases of doubtful right. *Free Press Association v. Nichols et al.* 7.

#### MORTGAGE.

1. The petitioner took a mortgage of the equity of redeeming three prior mortgages. The defendants, F. and M., purchased the mortgagor's equity of redemption, and paid therefor the first two mortgages, and a portion of the third, and thereupon went into possession of the premises,

and they, and their assigns, of whom were the other defendants, ever after occupied the same, and took the rents and profits to themselves. *Held*, that the defendants were entitled to the rents and profits, without accounting to any one, the same as the mortgagor would have been entitled had the possession of the premises remained in him. *Walker v. King et als.* 525.

2. *Held*, also, that the defendants, by subrogation, acquired all the rights which the respective mortgagees had by virtue of their mortgages, to the extent to which they paid off said mortgages, and that said mortgages, to that extent, constituted a part of the defendants' title to the premises, and that the petitioner was always bound to respect said mortgages to that extent. *Ib.*

3. *Held*, also, that the defendants were entitled to interest on said mortgages, to be computed according to the terms thereof, except as to those which had been merged in a decree, which would bear simple interest only. *Ib.*

#### NEW TRIALS.

1. A new trial will not be granted on the ground of newly discovered evidence, when such evidence is not decisive in character, nor when, by due diligence, the party could have produced the evidence at the former trial. *Lindsey & wife v. Danville*, 72.

#### OFFICERS.

1. The defendant, a constable, having an execution in favor of S. against the plaintiff in his hands for collection, after demanding, but before receiving, payment of the same, advanced the amount thereof to S., at his request, and retained the execution in his hands; and the money when paid thereon, was to, and did, belong to the defendant. Subsequently, the plaintiff, knowing the foregoing facts, paid the amount of said execution to the defendant, with the fees for the collection thereof, without objection. *Held*, that the plaintiff could not recover back the fees so paid. *Strafford v. Blaisdell*, 549.

*See SHERIFF*, 1, 2; *TRESPASS*, 1.

**OFFICER'S RETURN.** *See CHANCERY*, 17; *EVIDENCE*, 15; *PAUPER*, 3.

#### OFFSET.

1. The defendant delivered his stage horses to the plaintiff, to be kept at an agreed price. There was no promise on the part of the plaintiff, express or implied, to re-deliver said horses to the defendant on demand,

other than what might be implied from his agreement to keep them as aforesaid; but the defendant had a right to take them at any and all times, to use in his business, and had always done so until the plaintiff refused to permit him to do so, and detained them from him. *Held*, that such refusal and detention was a tort, and a conversion of the horses, and not the proper subject of a plea in offset. *Hudson v. Nute*, 66.

### PARTNERSHIP.

1. When negotiable paper is rightly taken payable to a partnership, any member of the partnership has authority to bind the firm by indorsing it in the firm name to a *bona fide* purchaser for value, in due course of business, even though, as between the partners, such paper was the sole property of the partner indorsing it, and the partners had agreed that no member should indorse paper to make the others liable. *Barrett v. Russell & Flint*, 43.

2. If one suffers another to hold him out as a partner, or to use his name in business as such, he is liable as a partner on a contract thus made, although in fact he has no interest in the business of such partnership. *Smith v. Hill et als.* 90.

3. H. and Harrington were never partners, and no such firm as H. & Co. ever existed; but Harrington gave the plaintiff a note for some staging property purchased by him, signed, "H. & Co., by Barrington," without the knowledge of H. Two or three years before said note was given, H. was informed that Harrington was using the name of H. & Co. in his staging business; and he afterwards saw Harrington and told him he must not use that name to injure him, and he said he would not. The plaintiff did not know of such previous use of that name at the time said note was given, and it did not appear whether Harrington made any representations to him at that time. *Held*, that H. was liable on said note. *Ib.*

4. *Held*, also, that, inasmuch as the signature to said note disclosed the name of H., it made no difference that the plaintiff did not know of the previous use of H.'s name as aforesaid, at the time said note was executed, for the legal intendment is, that the payee takes a note upon the faith of the persons whose names appear upon it as makers. *Ib.*

5. The plaintiff owned a tin-shop, and carried on the business in his own name. D. was a practical plumber of large experience. They made an agreement, whereby the plaintiff was to be allowed out of the profits of the business, ten per cent. on his stock invested, and the remainder of the profits were to be divided equally between them. They went on under that agreement, each devoting his whole time and

attention to the business, which was carried on in the plaintiff's name as before, and D.'s share of the profits remained in the concern. *Held*, a partnership. *Tyler v. Scott*, 261.

6. A partner has the right to pay his individual debt with the property of the firm, if no fraud upon the other partners is intended. *Ib*.

7. But, ordinarily, either partner should have the right to interfere, to prevent the diversion of the partnership property from the legitimate business of the partnership; but as to third persons, the intention to thus interfere should be clear beyond reasonable doubt. *Ib*.

8. The plaintiff, one of the partnership of B. & K., sold his interest in the business and property of the firm, including debts due them, to the defendants, upon condition that the property sold should remain the property of the plaintiff until paid for, and until the liabilities of said firm, which the defendants assumed, should be paid. B. retained his interest in the business, and kept along in it with the defendants. The defendants, with the consent and concurrence of B., and in the usual course of business, not having fully paid the plaintiff for said property, nor any of said liabilities, sold a portion of said property, without, at the time, intending to appropriate the avails thereof contrary to their agreement with the plaintiff; but they subsequently did appropriate said avails to their own private use, and abandoned said business. *Held*, that the plaintiff could not maintain trover against the defendants for the property thus sold by them. *Kellogg v. Fox & Minogue*, 348.

9. The defendant took a job of finishing a church at a certain price. Afterwards, the plaintiff and defendant agreed to go on together and do the job, each working himself, and the work of each to offset that of the other, the expense of materials, and of other help, to be deducted from the contract price, and the balance divided equally between them. They went on and did the job accordingly, and the plaintiff worked thereon thirty days more than the defendant. *Held*, that the parties were not partners as between themselves. *Hawkins v. McIntyre*, 496.

10. *Held*, also, that assumpsit would lie to recover what the defendant had received on the job more than his share, and that the plaintiff was entitled to have his extra work reckoned, in determining how much he was entitled to receive according to the agreement. *Ib*.

#### PAUPER.

1. If a person takes a pauper, chargeable upon any town, out of said town, under an arrangement with, or by the consent of, the overseer of the poor of such town, he will not be liable under §31, ch. 20, of the Gen. Stat. for returning said pauper to the town from which he took him, before said pauper had become chargeable to any other town. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

2. If a husband, having no settlement in this state, abandon his wife, she is remitted to her settlement before marriage. *Winhall v. Landgrove*, 376.

3. An officer's return on a warning against S. and four others, as follows: "Bennington, ss. Landgrove, February 17, 1815. Then served this precept by leaving a true copy of the same in the hands of the within named S. [Signed] D. W., Constable," *held*, bad. *Ib*.

4. Where a husband abandoned his wife, owning an interest not freehold, in lands which yielded but a small part of what was necessary for her support, it was *held*, that she could become legally chargeable as a pauper, and liable to removal. *Ib*.

5. The complaint for an order of removal was against C., late of G., and W. and her children, late of the defendant town. The order appealed from was only for the removal of W., with her family and effects, and C. was not named therein. *Held*, that the joinder of C. in the complaint was no cause for quashing said order. *Windham v. Chester*, 459.

6. An order of removal of a pauper, "her family and effects," is sufficient. The order need not set forth the names of the different persons constituting the pauper's family, any more than it need particularize the different articles of the pauper's effects. *Ib*.

#### PAYMENT.

1. The plaintiff voluntarily, and without the request of the defendant, paid taxes assessed on real estate in the possession of the defendant, who had the equitable title thereto, but the legal title of which was in the plaintiff, who claimed to own the equitable title also, and denied the title of the defendant, and her right of possession. *Held*, that the plaintiff could not recover of the defendant for the money thus paid. *Bryant v. Clark*, 483.

See TAXES, 4; INTOXICATING LIQUOR, 3.

#### PLEADING.

1. The notice of special matter alleged a submission to arbitration of the matter in controversy in this suit, after the commencement thereof, and the publication of an award, but only alleged that the award "was to the effect that the defendant was not liable to pay to the plaintiff any damage for the injury complained of." *Held*, that the notice was sufficient upon its face, and, the award not being shown to the court, it must be presumed that the award produced in evidence was in substance the same as the one described in the notice. *Edwards v. Harrington*, 63.

2. The declaration alleged that the defendant entered upon the land of the plaintiff, and then and there, without leave or license of the plaintiff, cut down and carried away the trees of the plaintiff, of the value of fifteen dollars, then standing and growing upon said land, contrary to the form and force of the statute in such case made and provided, and to the damage of the plaintiff, fifty dollars. *Held*, that in reference to the question of jurisdiction, the action must be regarded as an action of trespass on the freehold; but that the declaration did not sufficiently count upon the statute to make it an action founded upon the statute aforesaid. *Montgomery v. Edwards*, 75.

3. When several acts of violence to a person are committed within a short space of time, and at places a little distant from each other, and they are so connected that each, to some extent, characterizes the others, they, together, constitute a series of assaults and batteries, which may be declared for in one count, with proper allegations. *Earl & wife v. Tupper*, 275.

4. However it may have been at common law, by §9, ch. 33, of the Gen. Stat., the writ and declaration are blended and made one instrument; and in pleading, the writ may be referred to, to help out a defective averment, or the want of a material averment, in the declaration. *Church & wife v. Westminster*, 380.

*See* DIVORCE, 2; PRACTICE, 1.

#### PRACTICE.

1. In an action under the statute for unduly transporting a pauper into a town, it is necessary for the plaintiff to aver who the person was that was transported, that the defendant may know the particular charge he is to answer to; and this averment must be substantially proved. Whenever an objection of this kind is made, it may be replied that the description given is the one by which the party is generally known; and if this issue is found in favor of the description given, it is good, even though the legal name of the person may be different from the description given. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

2. It is the duty of the court to submit to the jury every material issue raised by the evidence in the case. *Andrews, adm'r, v. Moretown*, 1.

3. If there is any evidence tending to show that the parties to a contract might have understood it in a particular way, it is not error for the court, but rather their duty, to submit it to the jury to find whether they did so understand it. *Ib.*

4. The plaintiff is not precluded by his specification from recovering upon a cause of action not included therein, but which is declared upon,



and would be proper matter for specification, and grew out of the subject-matter of the specification actually filed, if the defendant admits such cause of action on trial. *Greenwood v. Smith*, 37.

5. In cases tried by the court in the county court, when the facts are found by that court, it is the common practice of the supreme court, if the judgment of the county court is reversed, to proceed and render such final judgment as the facts warrant. *Smith v. Hill et als.* 90.

6. A question once decided in a case, is not open for revision in the same case. *Rowan v. State Bank et als.* 160.

7. The plaintiff procured an amendment of his writ on the last day of the second term. Within thirty days thereafter, the defendant filed his motion to dismiss the action for causes arising from the amendment. At the next term thereafter, the court entertained said motion, and dismissed the action. *Held*, that the entertaining of said motion was not error. *Burns v. First National Bank of St. Albans*, 269.

8. It is the province of the court to instruct the jury as to the true light in which, under the law, the materials of evidence are to be considered and used; and, when some question arises on the subject, the court may lawfully state to the jury their impressions and understanding of how a witness meant to be understood, and indicate how such impressions and understanding were derived; especially when the court tell the jury that it is all a matter of fact for them to determine upon the testimony. *Missisquoi Bank v. Evarts*, 293.

9. It is error for the court to have any communication with the jury after a case has been submitted to them, and while they have it under consideration, except in open court. *State v. Patterson*, 308.

10. It is also error for the court to furnish the jury a copy of the statutes of the state, while they are out of court deliberating upon their verdict, that they may read certain provisions, designated by the court, touching the case under consideration. *Ib.*

11. No questions of law can be raised in the supreme court upon an auditor's report, except those arising either upon the facts reported by the auditor, or found and placed upon the record by the county court. *Hunt & Little v. Haynes*, 346.

12. When a judgment is more favorable to a party than he is entitled to have it, he cannot have it reversed on his own exceptions; and, it not being opened on his exceptions, the other party, who does not except, is not entitled to have it corrected in his favor. *Erwin & McKelsey v. Stafford*, 390.

13. The defendants were partners, and as such, were sued. There was no personal service of the writ on the defendant L., who resided out of the state, and had no knowledge of the suit until after judgment was rendered therein; but the defendant T., who resided in the state, and had the management of the partnership business, was personally served, and employed counsel to appear for both defendants, who appeared accordingly, and consented to judgment against both defendants, which was rendered, and execution issued. At the next term, said judgment was sued. At a subsequent term, the court, on motion of L. for that purpose, vacated said judgment as to L., and ordered the case brought forward upon the docket for trial. *Held*, that the court had the legal power so to do. *Franks v. Lockey et al.* 395.

14. When objection is made to the admission of testimony before an auditor, but no special exception to the ruling is filed in the county court, no question can be raised thereon, revisable in the supreme court. *Gibbs v. Sleeper*, 409.

15. If the charge be as favorable to a party as he has a right to have it, he cannot except to it, although not strictly correct. *Bates v. Sharon*, 474.

16. If a defendant claims judgment on the ground that he has proved a plea which is insufficient in law as a defense, he must, at least, prove as far as he does allege. *Bryant v. Pember*, 487.

17. Exceptions do not lie to the decisions of the county court in proceedings under the act entitled, "An act for the relief of the families of insane persons," approved November 10, 1870. It is only when that court exercises its jurisdiction, substantially, according to the course of the common law, that exceptions lie to its decisions. *Stiles v. Windsor* 520.

*See REPLEVIN*, 1.

#### PRINCIPAL AND SURETY.

1. The plaintiff and M., partners, agreed between themselves that M. should pay the defendant for a pair of oxen which they had purchased of him. M. accordingly sent his note to the defendant in payment for the oxen, but the defendant refused to accept it, and demanded and received payment of the plaintiff. It was then agreed between the plaintiff and defendant that the defendant should hold M.'s note, and not let it be known that he had received payment for the oxen, and if M. ever paid any thing on it, he should pay it to the plaintiff. M. subsequently paid \$85 on the note, not knowing that the defendant had received payment for the oxen. *Held*, that the plaintiff was merely surety for M.,

and, as such, became entitled by subrogation to all the securities and avails of securities received by the defendant; that the defendant held M.'s note as security; and that the money paid thereon belonged to the plaintiff. *Field v. Hamilton*, 35.

2. Where several sign a promissory note, and one of them is the real principal, the others, *inter sesse*, are, *prima facie*, sureties of the principal, and co-sureties of each other, and the burden of proof is on the party alleging the contrary. *Flanagan & Adams v. Post*, 246.

3. A security from a principal to one surety, enures, by operation of law, equally to the benefit of a co-surety. *Ib.*

4. If a principal procure one to sign a note with him as surety, upon the representation that the money raised thereon shall be paid upon debts where the surety is already holden for him, a co-surety is not affected by such a representation when the money thus raised is paid on a debt where he is sole surety for the principal, unless he had knowledge of such representation. *Ib.*

5. M., as principal, and A. F., and P., as sureties, executed a promissory note to raise money to pay a note on which P. was sole surety of M., and the note was delivered to P. to get discounted. P., before getting the note discounted, and on the faith of it, paid the debt on which he was sole surety, out of his own funds. *Held*, that P. was not then bound to cancel the note, or surrender it to his co-sureties. *Ib.*

PRIVITY OF ESTATE. *See* WILLS, 5.

PROCESS. *See* PLEADING, 4.

PROMISSORY NOTES. *See* PARTNERSHIP, 1, 3, 4; SALE, 11.

#### RECEIPTOR.

1. A receiptor of property attached on *mesne* process, is not liable on his receipt, when the property has perished without fault for which he is responsible. *Ide v. Fassett*, 68.

2. The plaintiff attached ten swarms of bees, and the defendant receipted them, but no mention was made, either in the attachment or the receipt, of the hives in which they were. *Held*, that the defendant was not liable for the hives under his receipt. *Ib.*

#### REPLEVIN.

1. The writ in this case, which was replevin for goods attached, did not require the officer to take a bond conditioned for a return of the

property, as well as for the prosecution of the replevin to effect and the payment of costs and damages, and the bond returned was signed by the plaintiffs only. *Held*, that these irregularities did not make the proceedings so void that the court had no jurisdiction of the parties and of the subject-matter of the suit, and that the defendant waived them by omitting to take advantage thereof within the time limited for filing dilatory pleas, and, also, by pleading to the merits. *Tripp et als. v. Howe*, 528.

#### SALE.

1. H. bought a stage-wagon of B., upon condition that it should remain B.'s till paid for. The plaintiff repaired it for H. by supplying new wheels and putting in new iron axles. H. wrongfully took it from the plaintiff's possession without paying for repairs. A few days thereafter, the plaintiff took H.'s note for the repairs, with an agreement that the "running part" of said wagon should remain his till said note was paid. H. never paid B. for the wagon, but the plaintiff knew nothing of B.'s claim. B., knowing the wagon had been repaired, but not knowing by whom, took it back from H. and sold it to the defendant, who knew nothing of the plaintiff's claim till long after his purchase. *Held*, that the plaintiff could maintain trover for said wheels and axles. *Clark v. Wells*, 4.

2. The conditional vendor of personal property can recover for injury thereto, although not entitled to the possession thereof at the time of the injury. *Kent v. Buck*, 18.

3. When any thing remains to be done by either, or both the parties to a contract of sale, before delivery, the title does not pass. *Gibbs v. Benjamin*, 124.

4. So inflexible is this rule, that when the property has been delivered, if any thing remains to be done by the terms of the contract before the sale is complete, the title to the property still remains in the vendor. The contract must be *executed*, to effect a complete sale. *Ib.*

5. The conditional vendee of personal property had no attachable interest therein under the statute of 1854, No. 12, when none of the purchase-money thereof had been paid by him. *BARRETT, J. Rowan v. State Bank et als.* 160.

6. The assignment of a bill of lading as collateral security, conveys title to the cargo. *Tilden v. Minor et. als.* 196.

7. The rule that the breach of an express warranty does not, in the absence of fraud, entitle the purchaser to rescind the contract of sale, considered and re-affirmed. *Matteson v. Holt & Hawkins*, 336.

8. A purchaser may rescind the contract for fraud; but the right to rescind must be exercised at the earliest practicable moment after discovery of the ground therefor. *Matteson v. Holt & Hawkins*, 336.

9. The defendant purchased a yoke of oxen of the plaintiff, which were eight years old, but which the plaintiff fraudulently represented to be only seven years old. The second day after the defendants took the oxen, one E. informed them that, in his opinion, judging from their appearance, the oxen were nine years old. The defendants continued to use the oxen five days after that, when they returned them to the plaintiff, and notified him that they were not as represented; but the plaintiff refused to receive them. *Held*, that the defendants exercised their right of rescission within a reasonable time. *Ib.*

10. If one sell and deliver property to another, absolutely, and the parties subsequently make it a conditional sale, a change of possession is necessary, to protect the property from attachment by the creditors of the vendee. *Wright v. Vaughn*, 369.

11. It is no defense to an action upon a note given for the price of a cow, that the cow was worthless at the time of the sale, if the sale was without fraud or warranty on the part of the vendor. *Bryant v. Pember*, 487.

*See* CHANCERY, 3, 7; PARTNERSHIP, 8; SHERIFF, 2.

SELECTMEN. *See* SOLDIER'S BOUNTY, 5; TOWNS, 1.

#### SHERIFF.

1. It has long been settled in this state, that an officer is not liable for property attached by him on *mesne* process, which has perished without fault for which he is liable. *Ida v. Fassett*, 68.

2. The plaintiffs sold and delivered a wagon to one M. for \$120, to be theirs till paid for. The defendant, as constable, attached the same as the property of M., on a writ in favor of P. & Co. against him. The wagon was stolen from the defendant within three days after the attachment, and never afterwards found. At the time of the attachment, \$60 of the purchase money remained unpaid. Soon after the attachment, the plaintiffs gave notice of their claim to the defendant, and to P. & Co., but no tender, or offer, of the amount unpaid, was ever made to the plaintiffs. Judgment was rendered against M. in said suit, and execution issued within thirty days. The value of the wagon at the time of the attachment, was \$95. *Held*, that the defendant was liable in trover for the full value of the wagon, and could not discharge himself by showing a loss thereof without his fault. *Duncans v. Stone*, 118.

## SOLDIER'S BOUNTY.

1. The books and records in the office of the adjutant general of the state, and not the date of muster-in, control as to who apply on the quota of a town under a given call, so as to entitle them to a bounty under the vote of the town to pay a bounty to those who should enlist and be credited to the town on their quota under such call. *Vide Bucklin v. Sudbury*, 43 Vt. 700. *Spalding v. Waitsfield*, 20.

2. Under an open offer by vote of a town to pay bounties to those who enlist and are mustered into service to fill the quota of the town under a certain call, they who first accept the offer, and comply with its terms, in number sufficient to fill the quota, exhaust it; and the true date of muster, and not the date of the muster-roll, governs as to who seasonably comply with the offer, to entitle them to the bounty. *Hunkins v. Johnson*, 131.

3. The books and records in the office of the adjutant general of the state, and not the date of muster-in, control as to who are entitled to bounty under a vote of a town to pay a bounty to those who should apply on a quota under a given call. *Vide Bucklin v. Sudbury*, 43 Vt. 700. *Moore v. Warren*, 199.

4. The defendant town voted to pay a bounty of \$300 to each man who had enlisted, or should enlist, into the *old* regiments, to fill the quota of the town under a given call. The plaintiff enlisted into a *new* regiment, but was actually applied on the quota named in the vote. *Held*, that he could not recover the bounty. *Carley v. Highgate*, 273.

5. *Held*, also, that an *intention* on the part of the plaintiff to comply with the offer made by said vote, was not a *compliance*; and that the selectmen of the town could not make a different contract, or waive a material condition in the offer of the town. *Ib.*

6. The defendant authorized its selectmen to offer a bounty of \$225 to each volunteer, to fill its quota under a certain call. Afterwards, the orderly sergeant of the plaintiff's company in the field, wrote to R., one of the defendant's selectmen, in behalf of O., a member of the same company, inquiring what bounty the town would pay for volunteers, and R. replied that the town would pay \$250. The plaintiff heard R.'s letter read in presence of his company, and, relying upon the statements thereof, and expecting to receive the bounty, re-enlisted to the credit of the defendant, reserving the right, and having the privilege, of changing his credit to any other town, before muster. Before muster, the plaintiff, learning that the town of S. was paying a larger bounty, directed the proper officer to change his credit to S., which was never done; but the plaintiff served till the close of the war, supposing he was credited

to S. The plaintiff gave the defendant no notice of his enlistment to its credit, until after his discharge; but the defendant had the benefit of his credit. *Held*, that the foregoing facts tended to show a contract between the plaintiff and the defendant. *Chandler v. Bristol*, 330.

7. *Held*, also, that the plaintiff's attempt to get his credit changed as aforesaid, did not prejudice his right of recovery against the defendant. *Ib.*

8. *Held*, also, that the fact that the "defendant received the benefit of the plaintiff's credit,"—in the absence of any evidence that he applied on any other quota, or that the town had another quota,—tended to show that he applied on the quota named in said vote. *Ib.*

9. *Held*, also, that if the town suffered no damage for want of earlier notice of the plaintiff's enlistment to its credit, earlier notice was not necessary. *Ib.*

#### STATUTES.

1. The provisions of No. 61, of the acts of 1867, entitled, "An act relating to state printing," which relate to advertising for sealed proposals for said printing, are mandatory. *Free Press Association v. Nichols et al.* 7.

2. But the requirements of said act, which relate to the time when said sealed proposals must be deposited in the office of the secretary of state, were not intended as a limitation of power upon the part of the officers therein named in examining and acting upon proposals. *Ib.*

#### STATUTES CONSTRUED, EXPLAINED, OR CITED.

1. Gen. Stat. ch. 20, §31, in relation to TRANSPORTING PAUPERS. *St. Johnsbury v. Goodenough*, 44 Vt. 662.

2. Acts of 1867, No. 61, in relation to STATE PRINTING. *Free Press Association v. Nichols et al.* 7.

3. Gen. Stat., ch. 24, §§64, 65, 44, in relation to HIGHWAYS AND BRIDGES. *Drown et als. v. Barton et als.* 33; *Jamaica v. Wardsboro and Townshend*, 416; *Moore et als. v. Chester*, 503.

4. Acts of 1866, No. 39, in relation to ARTICLES EXEMPT FROM ATTACHMENT AND EXECUTION. *Webster v. Orne*, 40.

5. Gen. Stat. ch. 113, §51, in relation to TREBLE DAMAGES. *Montgomery v. Edwards*, 75.

6. Gen. Stat., ch. 36, §24, in relation to WITNESSES. *Roberts, adm'r, v. Lund*, 82.

7. Gen. Stat. ch. 15, §12, in relation to WARNING TOWN MEETINGS. *Allen v. Burlington*, 202.

8. Gen. Stat. ch. 28, §§17, 26, in relation to RAILROADS. *Austin et als. v. Rutland R. R. Co. et als.* 215.

9. Acts of 1865, No. 184, in relation to the PROTECTION OF DEER. *State v. Norton*, 258.

10. Gen. Stat. ch. 33, §9, in relation to PROCESS. *Church & wife v. Westminster*, 380.

11. Acts of 1864, No. 74, in relation to REPAIRING HIGHWAYS AND BRIDGES. *Stockwell v. Dummerston*, 443.

12. Gen. Stat. ch. 52, §§10, 12, in relation to the SURVIVORSHIP OF ACTIONS. *Winhall v. Sawyer's Estate*, 466.

13. Acts of 1870, No. 33, in relation to the RELIEF OF THE FAMILIES OF INSANE PERSONS. *Stiles v. Windsor*, 520.

#### SUBSCRIPTION.

1. On the 19th of January, 1869, the defendant, a resident of Montpelier, subscribed for 100 shares of the capital stock of the plaintiff corporation, of \$100 each. At a legal meeting of the commissioners of said corporation, of whom the defendant was one, held December 20, 1869, the defendant, in presence of said commissioners, annexed the following written condition to his subscription: "Condition that good and responsible individuals in Montpelier subscribe fifty thousand dollars within one year from above date, and a list of subscribers, and amount of each, given me January 19, 1870." *Held*, that the true meaning of said condition was, that the amount of the defendant's subscription was to be counted towards the \$50,000 named therein. *Montpelier & Wells River R. R. Co. v. Langdon*, 137.

2. At said meeting, after the condition was annexed as aforesaid, the defendant agreed that, if the plaintiff would procure \$40,000 of subscriptions from individuals in Montpelier, it should be a compliance with said condition; and thereupon said commissioners accepted the defendant's subscription, with said condition annexed thereto. The plaintiff thereafterwards, and before the time mentioned in said condition, relying upon the defendant's subscription and his said agreement, at great trouble and expense, procured from good and responsible individuals in



Montpelier, subscriptions to the amount of \$40,700, besides the defendant's subscription, whereof the defendant was duly notified. *Held*, that the defendant was thereby estopped from claiming that by the terms of said condition the amount of his subscription was not embraced in said sum of \$50,000. *Montpelier & Wells River R. R. Co. v Langdon*.

### TAXES.

1. Under the following article in the warning of a city meeting, viz: "To vote upon the question of raising money by tax, or otherwise, to meet the accruing expenses of the city government, and for school purposes, for the ensuing year," it was *held*, that the meeting could not legally vote a tax, or authorize the mayor to borrow money on the credit of the city, for the purpose of erecting a high-school building. *Allen v. Burlington*, 202.

2. The only business article in the warning of a city meeting, held March 19, 1866, was in these words: "To vote whether the city will authorize the city council to pledge the credit of the city to an amount not exceeding \$150,000, payable in not less than 20 years, with interest at six per cent. per annum, to provide a supply of water for the use of the city." The meeting voted, in the language of the warning, to authorize the city council to pledge the credit of the city for the purpose therein named; and also voted to authorize the city council to annually assess upon the grand list of the city, in addition to certain other rates and taxes, a tax of ten per cent. to be invested as a sinking-fund, and to be applied in extinguishment of said water debt. *Held*, that said last named vote was void, and a tax assessed thereunder on the grand list of 1869, illegal. *Ib*.

3. *Held*, that said tax was also illegal, because not assessed upon the grand list of 1866. *Ib*.

4. If one pays a tax assessed against him, under protest, to save his property from distress, and himself from a penalty and costs, it is not such a voluntary payment as to preclude him from recovering back the tax so paid, if illegal, although no warrant may have issued for its collection. *Ib*.

### TENANTS FOR LIFE.

1. Tenants for life cannot make partition of the estate, binding upon those entitled in remainder. *Austin et als. v. Rutland R. R. Co. et als.* 215. <sup>^</sup>

### TOWNS.

1. One selectman cannot bind the town by a contract made by him without the knowledge or consent of the other selectmen. *Hunkins v. Johnson*, 181.

2. Neither can the town be bound by such contract by estoppel, any more than by the proper vigor of the contract itself. *Hunkins v. Johnson*, 131.

3. The plaintiff's selectmen laid out a highway, mostly upon the defendant's land, and principally for his benefit, and agreed with him that he should waive land damages, build the road, and keep it in repair while he lived where he then did, and that the town should remit all taxes assessed against him for the purpose of repairing highways, so long as he kept said road in repair as aforesaid. The defendant performed his part of said agreement, and kept said road in repair twelve years. The plaintiff recognized said agreement, and received the benefit of the defendant's performance thereof. *Held*, that the plaintiff thereby became bound by said agreement, whether the selectmen had authority to make it in the first instance or not. *Mount Holly v. Buswell*, 354.

#### TRESPASS.

1. In an action of trespass for false imprisonment, an officer cannot justify under an execution regular upon its face, where he commits the debtor in a different county from the one in which the arrest is made, when there is a legal jail in the latter county, although the commitment be made in the county commanded in the execution. *Clayton v. Scott et als.* 386.

#### TROVER.

1. On the occasion of a demand by the plaintiff, an attaching officer, of property receipted by the defendant, it was agreed that the defendant should deliver the property to the plaintiff at a time and place of sale to be appointed by the plaintiff. The plaintiff did not make such appointment, but, without making any further demand, sued the defendant on his receipt. *Held*, that he could not recover. *Ides v. Fassett*, 68.

#### TRUSTEE PROCESS.

1. H. & B. sold the defendant a threshing-machine, to be theirs till paid for. The defendant took possession thereof and paid part of the purchase-money, when H. & B., not having a recorded lien thereon, took the machine into their possession, with the defendant's consent, for the purpose of perfecting their lien. While thus in their possession, C., at the defendant's request, and professedly and ostensibly in his interest, and for his benefit, purchased H. & B.'s interest in said machine, and took possession thereof, knowing that the defendant had paid part of the purchase-money. C. did not expressly agree to buy the machine for the defendant, or to let him have it and take a lien thereon, or to pay him what he had paid towards it; but the defendant supposed, and had a right to suppose, that C. was buying it for him, and was to let him have

it to run, and give him a chance to pay for it. But C. refused to let him have it to run, or to pay him what he had paid towards it, and denied that he had any interest in it. *Held*, that C. could not be held chargeable as trustee of the defendant. *Smith v. Sharpe & Tr.* 545.

VOLUNTARY PAYMENT. *See* PAYMENT, 1; TAXES, 4.

### WILLS.

1. The rule that the marriage of a woman revoked a will made by her before marriage, rested for its reason on the fact that, by virtue of the husband's marital rights, the woman, becoming *covert*, became thereby disabled to dispose of the property named in the will,—the will ceased to be ambulatory. Hence, where a *feme sole* made a will, and married, and a considerable portion of the property disposed of by the will, remained in her, unaffected upon her death by any marital rights of her husband, who survived her, it was *held*, that the will was entitled to be probated. *Morton et als. v. Onion, Ex'r*, 145.

2. A will of all the testator's "estate, real and personal," will not embrace land of which the testator was in possession at the time of his death, but of which he had no title or color of title. *Austin et als. v. Rutland R. R. Co. et als.* 215.

3. A testator willed that all his estate be equally divided, and that his two daughters each have a life estate in a moiety thereof—remainder to their heirs forever. *Held*, that on the termination of the life estates, the heirs of each took a moiety in remainder in fee. *Ib.*

4. *Held*, also, that the will contemplated, in the matter of determining the rights of the owners of the successive estates, that the division to be made should be such as the law provided for, unless made by the respective successive owners. *Ib.*

5. There is no privity between one in possession of land under a will, under color and claim of only a life estate, and one in possession after the termination of the life estate, under the same will, claiming in remainder. The remainder-man takes from the testator, not from the tenant for life. Hence the possession of the tenant will not enure to the remainder-man. *Ib.*

6. The testator, after giving a legacy to his wife, gave the residue and remainder of his estate to his son, upon condition that, if "I should not return alive from the journey I contemplate making this summer with my wife, there is to be paid out from that part of my estate that is here given to my son, \* \* to H., the mortgage I hold against L. H. \* \* But should I return, and during my life make over said mortgage to H.,

my son's share is to be relieved from the payment of said legacy" to H. The testator returned from said journey, but did not make over said mortgage to H. The whole of the testator's estate was not sufficient to pay his wife's legacy. *Held*, that said mortgage belonged to his wife. *Hanks v. Latha, Ex'r*, 343.

## WITNESS.

1. In trover for certain mortgage notes, brought by the administrator of the wife against the husband, the plaintiff's testimony tended to prove that the defendant at some time admitted that said notes belonged to the intestate. *Held*, that the defendant was not a competent witness to any matter that occurred prior to the appointment of the administrator. *Roberts, Adm'r, v. Lund*, 82.

2. What a deceased party to a suit testified on a former trial, may be shown, by competent evidence, on a subsequent trial; and the attorney of such party, who took substantially correct minutes of the testimony, and, in many instances, the exact language of the party, is a competent witness for that purpose; and the minutes of the presiding judge need not be produced, or their non-production accounted for. *Earl & wife v. Tupper*, 275.

3. On a petition of the guardian of a woman for a decree of nullity of a marriage between her and one P., deceased, on the ground that her consent to the marriage was obtained by force and fraud, it was *held*, that she was not a competent witness. *Davis, guardian, v. Plymouth*, 492.

Ex. J. M.

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